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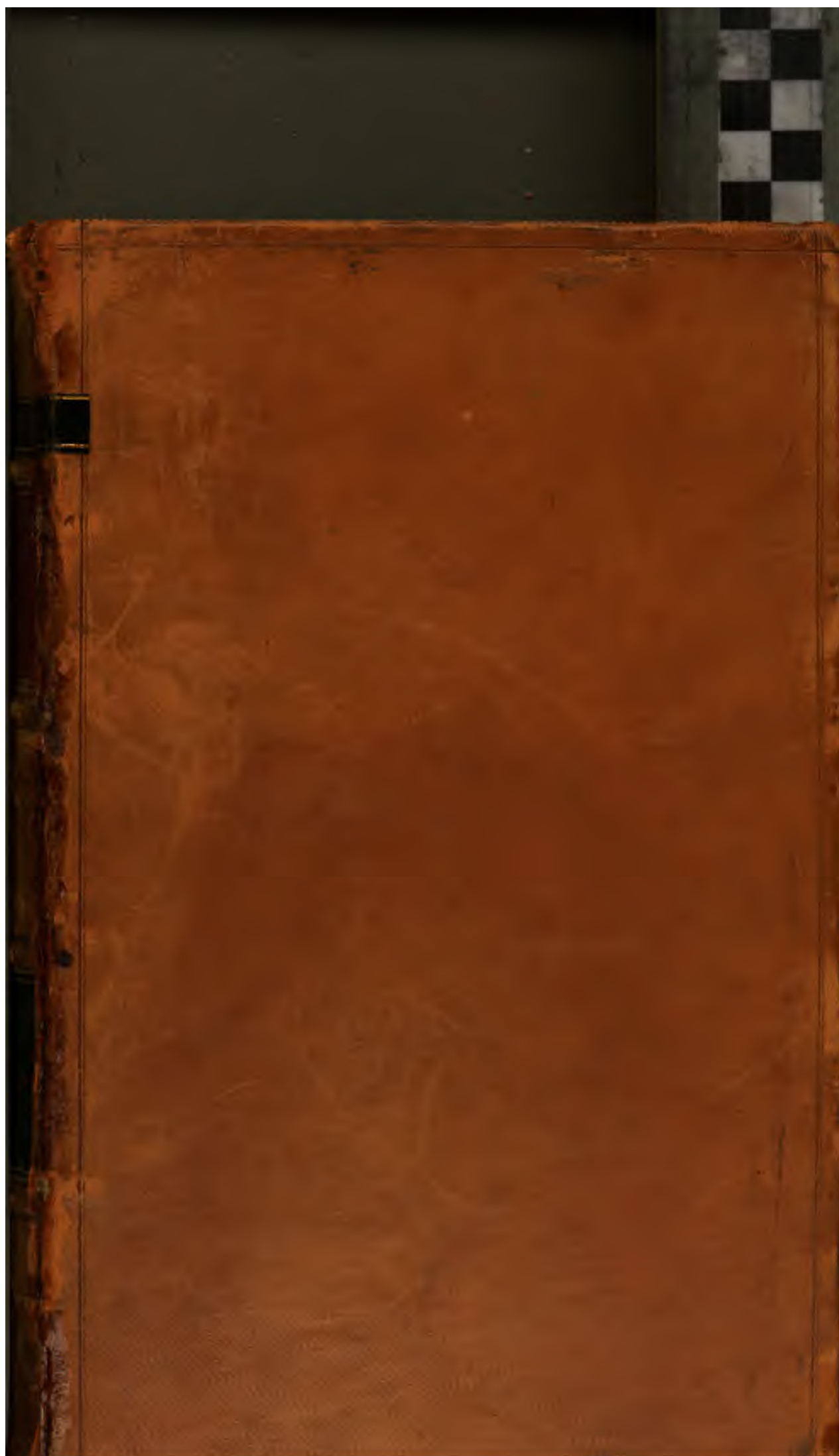
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A
TREATISE
ON THE
PRINCIPLES AND PRACTICE
OF THE
ACTION OF EJECTMENT
AND
STATUTORY SUBSTITUTES

BY
GEO. W. WARVELLE, LL. D.

AUTHOR OF A TREATISE ON ABSTRACTS OF TITLE, THE LAW OF VENDOR
AND PURCHASER, PRINCIPLES OF REAL PROPERTY, ETC.

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1905

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To the

HON. RICHARD W. CLIFFORD,

One of the Judges of the Circuit Court of Cook County, Illinois, in token of appreciation of his merit as a Man and his ability as a Lawyer, this work is inscribed by

THE AUTHOR.

PREFACE

It is now almost one hundred years since John Adams, of the Middle Temple, Esq., gave to the legal profession his luminous and able treatise on the Action of Ejectment. During this interval the changes to which the remedy has been subjected have been many and great, yet its essential character remains the same now as then. The task that Mr. Adams set for himself in the early years of the last century is not materially different from that which confronts the writer of today, and the words which he employed in the opening paragraph of his preface I may well adopt as my own at this time. Speaking of his work he said:

"It has been the Author's chief endeavour, in the following pages, to investigate the principles upon which the remedy by Ejectment is founded; to point out concisely the different changes which the action has undergone; and to give a full and useful detail of the practical proceedings by which it is, at this time conducted. To this end the later decisions have been very fully considered; whilst a slight mention only has been made of the more ancient cases, now, for the most part, indirectly overruled, or altogether inapplicable to the modern practice."

But the later decisions which Mr. Adams so fully considered are now, for the most part, "altogether inapplicable to the modern practice" and have themselves become "ancient cases," to which only slight reference need be made. The radical changes in the form of the action, which were instituted by the State of New York about the year 1830, have rendered utterly useless the old precedents; the old decisions are now but little more than monuments of obsolete learning; and the writer who assumes to treat the subject today, must, in large measure, conduct his work on new and original lines. This I have endeav-

ored to do in the present volume, and while the work may not possess that completeness which should characterize some of the topics discussed, I am yet emboldened to hope that it will be found a practical aid in the solution of many perplexing questions and an acceptable contribution to the general literature of the subject.

As the action, as now administered, has been shorn of its fictions, and differs but little in its general features from other actions at law, there no longer exists the necessity of those minute specifications of the details of pleading and practice which abound in the works of the earlier writers. The pleadings, therefore, have been given only incidental attention, no more being attempted than to show their general structure and the character of the allegations. On the other hand, special emphasis has been placed on the proofs. The nature of the evidence required to sustain or defeat the action has been very fully considered and the different forms of title that may be involved have received corresponding treatment. The citation, while liberal, does not profess to be exhaustive. The work is essentially a treatise, not a digest.

The very favorable reception given to the writers previous works induces the hope that the present venture will be received with the same kind indulgence.

G. W. W.

Chicago, December 1, 1905.

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A TREATISE ON THE ACTION OF EJECTMENT

CHAPTER I.

PRELIMINARY VIEWS.

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|---|---|
| <p>§ 1. Introductory.
2. Real actions at common law.
3. Requisites of real actions.
4. Ejectment.
5. Origin and history.
6. Nature of the ancient remedy.
7. Enlargement of the remedy.</p> | <p>§ 8. Development of the action.
9. Rolle's system of fictions.
10. Present condition of the action.
11. Trespass to try title.
12. Action to quiet title.
13. Forcible entry and detainer.</p> |
|---|---|

§ 1. **Introductory.**—Sir William Blackstone, at the conclusion of his admirable essay on possessory actions,¹ aptly says, that, in the consideration of the subject, he had been “unavoidably led to touch upon much obsolete and abstruse learning, as it lies intermixed with, and alone can explain the reason of, those parts of the law which are now more generally in use. For, without contemplating the whole fabric together, it is impossible to form any clear idea of the meaning and connection of those disjointed parts which still form a considerable branch of the modern law.” So, in the present work, the writer has had frequent occasion to allude to the procedure and methods of the obsolete systems of former years, yet, believing with the illustrious author just quoted that a knowledge of the past is essential to a just comprehension of the methods of the present, he is induced to hope that the indulgent reader will find this no

¹ 3 Blk. Com. 196.

defect in a work which assumes to be an exposition of modern law, and that the historical side lights which have been thrown on many phases of our subject will increase, rather than detract from, the general interest. Therefore, before entering upon a discussion of the principles and rules which control the modern action of ejectment, or its statutory substitutes, it may be well to briefly recite the steps which have led up to present methods. This will enable us to obtain clearer perceptions of the law as it is and will furnish a key to some of the historical allusions which the author, in the development of his subject, has deemed necessary or expedient.

§ 2. **Real Actions at Common Law.**—In the early stages of the law of Real Property, as administered by the English courts, there were a large number of what were known as real actions, which varied greatly according to the nature of the thing sought to be recovered and the title or estate upon which the claim of the demandant was based.² These actions were divided into two general classes termed respectively *possessory* and *proprietary*.³ The former lay whenever a party in possession of lands was disseized or ousted, or where, having the right to possession he was kept out of same, in either which event he was permitted to bring his action by *writ of entry* for the purpose of restoring such possession.⁴ In time the writ of entry in all of its forms, and there seem to have been a large number of them, became merged into or superseded by the action of ejectment, and thereupon disappeared. It remained long in use, however, and appears to have been extensively employed in this country during the colonial era, and even after the Revolution we may find traces of it in several of the eastern states. But there would often occur cases where the claimant had lost his right of possession, leaving in him only a naked right⁵ to sue for the purpose of establishing the valid-

² See 1 Roscoe, Real Actions, 3, *et seq.* See also an excellent summary in Prof. Martin's Civil Procedure, 104.

³ Styled in the legal language of the times *droitural*.

⁴ Writs of entry were probably invented during the early part of the reign of Henry III, al-

though Blackstone asserts that they were in use during the time of the Saxons. See 3 Blk. Com. 184. This, however, is only conjecture. As a matter of fact we know very little of English law prior to the time of Edward I.

⁵ A *jus merum*, or mere right, as it seems to have been termed.

ity of his proprietary interest. Thus, it is said, if a man be disseized the law gives him the right of recovering the land immediately, either by entering upon the tortious possession of the disseizor, or by bringing a possessory action; if, however, he should neglect to pursue this right, and the disseizor should die, having been in possession for the prescribed statutory period,⁶ the heir of the latter would thereby acquire an apparent right of possession, and this right he could not be deprived of save by process of law. In such event the disseizee would therefore be driven to a writ of entry. Should he still neglect to avail himself of this latter remedy, within the period limited by law, his only resort would be his right of property (*jus proprietatis*), and this he might assert by bringing a *writ of right*.⁷

This latter writ remained in use in England until very recent times and was formerly much employed in the United States when the action of ejectment was still of a strictly possessory character. By a statutory provision in most of the states the action of ejectment may now be brought in the same cases in which the writ of right was formerly allowed, while in some jurisdictions it is expressly declared to be a substitute for that ancient remedy.⁸

§ 3. **Requisites of real actions.**—The division of actions, into writs of entry and writs of right, was based on the distinctions made by the medieval English lawyers between possession as an actual occupancy, the right of possession without actual occupancy, and the right of property without either the right of possession or an actual occupancy, and the writs were framed to meet the varying exigencies which these conditions might produce. But in every event the claim of right was required to be founded on a freehold estate. Thus the writ of entry could be predicated on no estate for less than life and it seems the writ of right could only be brought by one who had or claimed an estate in fee, and in both cases the writ would lie

⁶ By the statute 32 Hen. VIII, c. 35, this period was fixed at five years.

⁷ 1 Roscoe, Real Actions, 19; Co. Litt. 266a; Gilb. Ten. 20; 2 Blk. Com. 197.

⁸ This was one of the provisions of the Revised Statutes of New York, which was subsequently adopted by a large number of states.

only for land or something of a corporeal nature such as might be demanded in a *præcipe*. It is further to be observed that not only was the demandant in a real action required to have a right to the freehold, and not merely a right to a chattel interest, as a term of years, but, in general, the writ could only be brought against the actual tenant of the freehold and not against a tenant for years or other person having only a chattel interest.

The writ of entry served only to restore possession. The action decided nothing with respect to the right of property, or actual ownership, and even though the demandant was restored to the position he occupied before the ouster this was without prejudice to the right of ownership and the dispossessor might still assert any legal claim that he might have, notwithstanding such recovery. The writ was applicable, however, to all cases of ouster, with a few inconsequential exceptions, and seems to have been the generally observed remedy to recover possession, when wrongfully withheld from the owner.⁹

The writ of right seems to have been final, but, as before stated, this lay only for the recovery of lands claimed in fee which were unjustly withheld from the true owner. The demandant was obliged to allege and prove a seizen, either in himself or the person under whom he claimed, and where this was denied the issue of title was raised and determined.

These writs, in their various forms, were the only remedies for the recovery of lands. It will be seen that they involved only the freehold, and hence were inadequate for the assertion of many forms of possessory rights. As a consequence the holders of inferior interests were obliged to seek other means of redress when their possession was invaded. The most natural would be an action of trespass against the wrongdoer and from this action of trespass has resulted a form of legal relief which has finally superseded all of the older forms above mentioned. The development of this action will be shown in the subsequent paragraphs.

§ 4. **Ejectment.**—The evolution of the action of ejectment from its primitive form as a mere action of trespass, en-

⁹ 3 Blk. Com. 183.

abling a lessee of lands to recover damages when ousted of his possession, through a series of most ingenious fictions, which were afterwards added to enable him to recover possession as well, until its final establishment as the proper method of trying all disputed titles to real property, presents to the student of legal science one of the most interesting studies that the history of the law affords. Few remedies have passed through so many changes of form, both in pleading and practice, and yet retained the same distinctive character that marked their origin. It is true, that in some states the action, *eo nomine*, is now unknown, yet the right to recover the same estates, rights, and interests in lands remains and is enforced by action as before, and the action to be brought is still an action at law as distinguished from a suit in equity, while in all the forms of the remedy, as they are now used in practice, the essential principles are the same.

§ 5. **Origin and History.**—During the early stages of English legislation succeeding the Norman conquest, war, and its attendant consequences, formed the primary object of the law-maker's attention. Provision was indeed made for the feudal lords, by the adoption of writs of entry and of right, but the interests of the inferior tenantry were entirely disregarded, and the remedies for the recovery of lands altogether confined to freehold titles vested in the superior landholders. Vassals were seldom permitted by their lords to enjoy any interest in the lands they occupied, and where grants of the possession were given for a determinate period such grants were not considered as transferring to the grantee any title to or interest in the land, but merely as constituting personal agreements between lord and vassal.

The ancient writ of covenant seems to have been the first remedy introduced for a dispossession, and although this originally provided only for a recovery of damages it was subsequently adapted for the recovery of the term as well.¹⁰ But this writ was available only against the lessor for an ouster or breach of the original contract, and the tenant was still left without any means of redress when dispossessed by a stranger

¹⁰ 3 Blackstone, Com. 158; Gilb. Eject. 2.

claiming under a title superior to that of the lessor, or by a person claiming under a subsequent feoffment from such lessor, and though in the latter case the tenant might still recover damages for the injury he had sustained, he had no means of regaining possession of the land from which he had been ousted.¹¹

Thus matters remained until the time of Henry III, when a full remedy was provided for a termor who was dispossessed by any person whomsoever claiming under the title of the lessor.¹² This remedy, called the writ of *quare ejecit*, enabled the plaintiff to recover both damages and his term, if the term were unexpired, but its greatest advantage was in the power it conferred of proceeding against third persons as well as against the original grantor. Notwithstanding this favorable change, however, the tenant was still without remedy when dispossessed by a mere stranger, or one not claiming under his grantor, and though he might, when so dispossessed, throw himself on the protection of his grantor, and leave his lord to recover by a real action both the freehold and possession, yet in process of time the vassal demanded a remedy for himself. This, it seems, was accorded to him during the reign of Edward II, or the early part of that of Edward III,¹³ when a writ, called *ejectione firmæ*, was invented, which gave a lessee for years a somewhat imperfect remedy against all persons whomsoever who ousted him of his term, and this writ may fairly be said to be the foundation of the modern remedy by ejectment.

§ 6. **Nature of the Ancient Remedy.**—The new writ was a writ of trespass in its nature, and the process upon it was by attachment, distress or outlawry. It called upon the defendant to show, wherefore, with force and arms, he entered upon certain lands which had been demised to the plaintiff for a term then unexpired and ejected him from the possession thereof; and comprised all cases, except where the lessor himself ejected the lessee and subsequently enfeoffed another. In this latter

¹¹ Bracton, b. 4 f. 220; 3 Black. Com. 200; Adams, Eject. 3; Gilb. Eject. 2.

¹² 3 Reeve's Hist. Eng. Law, 29.

¹³ 3 Reeve's Hist. Eng. Law, 29.

case the old writ of *quare ejecit* was resorted to, as the second lessee, coming into possession through a title and under a claim of right, could not be said to be a trespasser. Even the lessor was liable to be sued upon this new writ, notwithstanding the old doctrine that a man could not enter *vi et armis* into his own freehold, but the plaintiff, not possessing a freehold interest, could assert title, in this action, only so far as to give him damages for the injury but not to restore to him the possession of the term.¹⁴

§ 7. **Enlargement of the Remedy.**—With the decline of the feudal policy and the advancement of agriculture the value and importance of inferior estates were greatly enhanced and they began to become objects of legislative regard. A more effective protection was demanded for lessees for years, and it became customary for leaseholders, when disturbed in their possessions, to apply to courts of equity for redress, and to prosecute suits against the lessor himself to obtain specific performance of the terms of the grant, or against strangers for perpetual injunctions to quit the possession, and, it seems, these courts would then compel a restitution of the land.¹⁵ The common-law courts soon adopted this method,¹⁶ not by the invention of a new writ, but by adapting the one already in existence to the altered circumstances, and by introducing a species of remedy neither warranted by the original writ nor demanded in the declaration, to wit: a judgment for the recovery of the term and a writ of possession thereupon.¹⁷

¹⁴ Fitz. Nat. Brev. 505; Adams' Eject. 8; 3 Reeve's Hist. Eng. Law, 29.

¹⁵ Gilb. Ejectment, 2; Adams, Eject. 8.

¹⁶ It is singular that neither the causes which led to this important change, nor the principles upon which it was founded, are recorded in any of the legal authorities of those times. It is difficult, if not impossible, to ascertain with accuracy the precise period when the alteration itself took place; although it certainly must have been made between the years 1455 and 1499, since, in the former year, it is

said by one of the judges, that damages only can be recovered in ejectment; and an entry of a judgment is still extant, given in the latter of those years, that the plaintiff in ejectment shall recover both his damages and his term. It is said, indeed, in argument, as early as the year 1458, that the term may be recovered in ejectment, but no reason is assigned for the assertion, nor is any decision upon the point on record until the time of the entry already mentioned. Adams, Eject. 8.

¹⁷ 3 Black. Com. 200; 3 Reeve's Hist. Eng. Law, 391. This

The effects produced by this alteration were highly important. The new efficacy thus given to the action of ejectment soon caused the disuse of the old real actions, and it became gradually the regular mode of proceeding for the trial of all possessory titles, and thus the use of the action, as well as its nature, were completely changed.¹⁸

§ 8. Development of the Action—Introduction of Fictions.—The proceedings in the action, as originally administered in the trial of disputed titles, were very simple and regular, differing but little from those previously in use, when ejectment was brought to recover damages for an actual trespass. But the exigencies of the times, and the subtleties of courts, soon caused the introduction of a number of technical complications which succeeding years developed into a series of most remarkable and ingenious legal fictions.

The right to the freehold could only be determined in an indirect manner. It was a term which was to be recovered by the judgment of the action, and it was therefore necessary that a term should be created; and as the injury complained of in the writ was the loss of possession, it was also necessary that the person to whom the term was given should be ejected from the lands. In order to obtain the term, therefore, the party claiming title entered upon the disputed premises, accompanied by another person, to whom, while on the lands, he sealed and

change seems to have occurred during the reign of Edw. IV, and in the time of Elizabeth had become a common method for the trial of titles to land.

¹⁸ That an action of ejectment, by means of this alteration in its judgment, might restore termors to possession who had been actually ejected from their lands, is sufficiently obvious; but it is not, perhaps, so evident how the same proceeding could be applicable to a disputed title of freehold, or why, as soon after happened, the freeholder should have adopted this novel remedy. No report of the case in which this bold experiment was first

made is extant; but from the innumerable difficulties which attended real actions, it is not surprising that the freeholder should have taken advantage of any fiction which enabled him to avoid them; and as the court of common pleas possessed an exclusive right of judicature in matters of real property, it is probable that the experiment originated in the court of king's bench, as an indirect method of giving to that court a concurrent jurisdiction with the common pleas. But, however this may be, the experiment succeeded, and the uses of the action, as well as its nature, were changed.

delivered a lease for years. This entry was necessary to avoid the effect of the old law of maintenance,¹⁹ and it was from the necessity of this entry that the remedy was confined to claimants who had a possessory title or a right of entry upon the lands, a feature which the action has always retained and which constitutes one of its present chief characteristics.²⁰ The lessee of the claimant, having acquired a right to the possession by means of the lease just mentioned, remained upon the land, and the next person who came upon the freehold *animo possidendi*, or, according to some of the old authorities, even by chance, was accounted an ejector of the lessee, and a trespasser on his possession. A writ of trespass and ejectment was then served upon the ejector by the lessee. The cause then regularly proceeded to trial, and, as the lessee's claim could only be founded upon the title of the lessor, it was necessary to prove the lessor's interest in the land to enable the plaintiff—the lessee—to obtain a verdict. The claimant's title was thus indirectly determined, and though the writ of possession issued in the plaintiff's name, yet, as he prosecuted the suit only as the lessor's friend, he would immediately give up to the lessor the possession of the land.

During the earlier stages of the action, this mode of proceeding was attended with no evil consequences. The party previously in possession, was, in contemplation of law, always upon the land and certainly *animo possidendi*, and the friend of the claimant was allowed to consider him an ejector, and make him the defendant in the action. But when the remedy came into more general use these methods were found to be productive of considerable evil. Thus, it was found that the claimant might conceal the proceeding from the person actually in possession by procuring a second friend to enter upon the land and expel the lessee immediately after the execution of the lease. The lessee might then commence his suit against this ejector, and the real party in interest, the person in actual possession,

¹⁹ According to this law it was a penal offense to convey a title to another when the grantor himself was not in possession, and it seems at one time to have been doubted whether this nom-

inal possession, taken only for the purpose of trying the title, was sufficient to excuse him from the penalty of the offense.

²⁰ Wood v. Morton, 11 Ill. 547.

be ousted without an opportunity to defend the title. To check this evil a rule of court was made requiring the plaintiff, before proceeding against such third party, to give notice to the person in possession of the pendency of the proceeding, and it was the practice of such person, if he claimed any title to the land, to apply for permission to defend, which was always granted, although the suit proceeded in the name of the original defendant. Through the alteration in the manner of proceeding, occasioned by this rule, it soon became the general practice to have the lessee ejected by some third person, since called the *casual ejector*, and to give notice to the person in possession, instead of making him, as before, the trespasser and defendant. The time when this rule was made is not known, but it is supposed to have been adopted soon after the remedy grew into general use. It seems to have been the first instance in which the courts interfered in the practice of the action and is further remarkable as the foundation of the fictitious system by which it was afterward so long conducted.

§ 9. **Rolle's system of Fictions.**—The action seems to have continued in the condition just noted until the time of the English commonwealth, when the trouble and inconvenience occasioned by the observance of the different formalities produced the invention, by Chief Justice Rolle, of the Court of Upper Bench, of a new method of proceeding which at once superseded the former practice and became the basis of the subsequent form of the action. By this new method was introduced the series of legal fictions which so long distinguished the proceeding. All of the prior forms, as just described, were dispensed with. No actual lease was made; no actual entry by the plaintiff nor actual ouster by the defendant was effected; the plaintiff and defendant in the suit were merely fictitious names; and all the preliminaries, which by the former practice were required to be actually complied with, were only feigned.

In this new proceeding it was stated that a lease for a term of years had been made, by one who claimed title, to the plaintiff in the action; that the plaintiff entered thereunder and that the defendant, the casual ejector, ousted him, for which ouster the action was brought. After the action had been commenced, the casual ejector, or nominal defendant, sent a writ-

ten notice to the person in possession informing him of the pendency of the action and also transmitted a copy of the declaration, with the assurance that he, the defendant, had no title to the lands in dispute and would make no defense to the action. At the same time he advised the person in possession to appear and defend his title, otherwise he, the casual ejector, would suffer judgment to be had against him. Upon receipt of this notice the person in possession was allowed a limited time in which to make an application to be substituted as defendant in place of the casual ejector, and upon his default judgment was rendered against the casual ejector and the real party in interest ousted of his possession by the sheriff.

Should the person in possession be admitted to defend, it was upon a condition that he admit or confess all of the fictitious steps, as the making of the lease, entry, ouster, etc., whereupon the tenant, or person in possession, was substituted for the fictitious defendant and the trial proceeded on the merits.²¹

²¹ The following terse and very clear summary of the action as it existed and was administered in England in the year 1812 is given by Mr. Adams in his treatise on Ejectment, published in that year:

"A., the person claiming title, delivers to B., the person in possession, a declaration in ejectment, in which C. and D., two fictitious persons, are made respectively plaintiff and defendant; and in which C. states a fictitious demise of the lands in question from A. to himself for a term of years, and complains of an ouster from them by D. during its continuance. To this declaration is annexed a notice, supposed to be written and signed by D., informing B. of the proceedings, and advising him to apply to the court for permission to be made defendant in his place, as he, having no title,

shall leave the suit undefended. Upon the receipt of this declaration, if B. does not apply within a limited time to be made defendant, he is supposed to have no title to the premises; and upon an affidavit that a declaration has been regularly served upon him, the court will order judgment to be entered against D., the casual ejector, and possession of the lands will be given to A., the party claiming title. When, however, B. applies, pursuant to the notice, to defend the action, the courts annex certain conditions to the privilege. Four things are necessary to enable a person to support an ejectment, namely, title, lease, entry, and ouster; and as the three latter are only feigned in the modern practice, C. (the plaintiff) would be nonsuited at the trial if he were obliged to prove them. The courts, there-

This was, substantially, the action introduced into the American colonies as a part of the law and procedure of the mother country, and which continued, with only slight alterations, during many years of national existence, finding expression in some states as late as the year 1848.

§ 10. **Present condition of the Action.**—When the aggressive spirit of legal reform in the United States commenced to manifest itself, during the earlier part of the last century, this action was one of the first to feel its influence. The fictitious introduction was found to be only a clog and hindrance, in no way necessary or even conducive to a complete administration of justice, and notwithstanding the system possessed many and obvious advantages over any previous method, it was still imperfect and deficient in many important particulars. Then followed a general abolition of the old fictions; additional legislation supplied the defects and widened the scope of the remedy, which finally came to be administered through the medium of the ordinary forms of practice, differing in no material respect from other civil actions.

In simplicity and directness the modern action greatly resembles the original form of the remedy prior to the introduction of fictions; all useless procedure has been abolished, and the practice reduced to a regular and settled system, which, while differing somewhat in the method of its application according to the statutory policy of the locality, is remarkably uniform throughout the entire country. As a rule, the old

fore, compel B., if made defendant, to enter into a rule, generally termed *the consent-rule*, by which he undertakes that at the trial he will confess the lease, entry and ouster to have been regularly made, and rely solely upon the merits of his title; and, lest at the trial he should break this engagement, another condition is also added, that in such case he shall pay the costs of the suit, and shall allow judgment to be entered against D., the casual ejector.

These conditions being complied with, the declaration is altered, by making B. the defendant instead of D., and the cause proceeds to trial in the same manner as in other actions."

This, it would seem, continued to be the practice in England until the year 1852, when it was abolished by the Common Law Procedure Act, and a new action was created substantially the same as that which now prevails in the United States.

name has been retained to designate the statutory actions substituted for the common-law remedy, and even where attempts have been made to fasten upon it a new title the old name is still employed by the practitioner upon all ordinary occasions.

The basis for the modern action, as now administered in a majority of the states, is the procedure promulgated by the Revised Statutes of the State of New York in the year 1830. The new practice thus introduced was adopted in its entirety by a large number of then existing states, as well as by others which were subsequently created, and the verbiage of the original enactments has been preserved with but little change. Even in those states where reformed codes of civil procedure were afterward adopted, whereby the distinctions of law and equity were ostensibly abrogated and the old forms of action abolished, the action of ejectment remains much as before. A survey of the legislation of the states discloses the fact that in the so-called code states the general features of the action are the same as in the common-law states. In some instances its scope has been broadened by the admission of claims and defenses based upon equities, but this is the most marked departure. In essential structure the action is the same in all of the states and presents the most perfect piece of uniform legislation that we possess.

§ 11. **Trespass to try Title.**—In the year 1791 the State of South Carolina instituted a new remedy for the recovery of possession of lands and the determination of disputed titles, by an adaptation of the old action of *quare clausum fregit*. In this action the defendant was always permitted to justify his entry by a plea of free hold (*liberum tenementum*) in himself, or in some other person under whose authority he assumed to act, which conferred a right of immediate possession. In this way the title of a freehold was directly put in issue, but, as the action was distinctly one of tort, the only recovery by the plaintiff was for damages. The new remedy, in practical effect, extended the old action of trespass to wrongs theretofore redressed by the action of ejectment and gave to the successful plaintiff, who had been ousted by the trespasser, not only his damages but a writ of possession as well. A technical trespass, however trifling, was sufficient evidence on which to main-

tain the action, and the judgment rendered concluded the parties with respect to title.²²

This form of action was subsequently introduced into several other states but at present obtains only in the State of Texas, having been superseded in the state of its origin, and other localities, by the modern statutory action of ejectment. While the scope of the remedy is very broad, combining many of the incidents of the equitable action to quiet title, yet the essential principles of the action of ejectment are preserved, and, it would seem, the settled and long established rules of ejectment are still of controlling efficacy.²³

§ 12. **Action to quiet Title.**—In a majority of the states there is now provided a statutory action to quiet title and remove clouds. In most cases the action will lie whether the lands in controversy are improved or vacant, but in order to maintain the suit it is generally essential that the claimant shall be in the actual or constructive possession thereof.²⁴ In those states where the fundamental distinctions between law and equity are preserved the action is instituted by a bill in chancery while in those states which have ostensibly abolished the distinctions the suit still partakes of an equitable nature and is governed by equitable principles. It is founded on the inherent jurisdiction of equity to quiet title and is intended to reach persons out of possession who cannot be compelled to assert or defend their right at law.²⁵

It will be seen, therefore, that while there are points of resemblance between ejectment and the equitable remedy to quiet title, and while the ultimate object of the two suits is much the same, that is, the determination and settlement of conflicting claims of title, there is yet a wide difference between the methods employed. Nor is the statutory proceeding to quiet title in any sense a substitute for the action of ejectment.²⁶ It is designed only for the relief of persons, who,

²² *Martin*, Civil Procedure, 147.

²³ *Thurber v. Conners*, 57 Tex. 96.

²⁴ *Gage v. Abbott*, 99 Ill. 366; *Gould v. Sternburg*, 105 Ill. 488; *Lee v. Simpson*, 29 Wis. 333.

²⁵ *Barron v. Robbins*, 22 Mich. 22; *Reed v. Tyler*, 56 Ill. 288; *Improvement Co. v. Trustees*, 37 N. J. Eq. 266.

²⁶ *Snowden v. Tyler*, 21 Neb. 199; *Davis v. Settle*, 43 W. Va. 17.

being in peaceable possession, have no means of contesting an adverse claim by a suit in due course of law, and courts are generally strenuous in their insistence that a claimant resorting to this remedy must bring himself fully within the spirit as well as the letter of the statute. Thus, if the lands in controversy are vacant or unoccupied, then, notwithstanding the claimant has a constructive possession, he will still be required to resort to ejectment for a determination of his rights. The only question in such a case being one of title, he has a full, complete, and adequate remedy at law.²⁷

It is true, as a general proposition, that when a court of equity has taken jurisdiction for one purpose, it will retain the case to do complete justice between the parties, even to the extent of determining legal rights. But this practice, which grew out of the equitable doctrine of discovery,²⁸ will not be extended to determine the legal title to land when it is in dispute and a trial by jury is necessary by reason of controverted questions of fact.²⁹ The rule is well settled that equity has no jurisdiction to settle the title and bounds of lands between adverse claimants, unless the plaintiff has some equity against the person claiming adversely to him, and will never assume jurisdiction to try conflicting titles, upon the sole ground of removal of a cloud from title, if the adverse claimant is in actual possession.³⁰

§ 13. **Forcible Entry and Detainer.**—In all of the states the statute provides a civil action for the restitution of possession of lands that have been forcibly entered and occupied, or which are unlawfully detained after a lawful right of entry and occupation has expired. It is a summary remedy for the dispossession of a person who has forcibly entered upon the possession of another, or forcibly detains such possession from him, and the only question to be tried is the fact of disposses-

²⁷ *Shepherd v. Nixon*, 43 N. J. Eq. 627; *Whitehead v. Shattuck*, 138 U. S. 150; *Odle v. Odle*, 73 Mo. 289; *Hecht v. Colquhoun*, 57 Md. 563.

²⁸ *Story, Eq. Jur.*, §§ 64*k*-74.

²⁹ *Freer v. Davis*, 52 W. Va. 1, 94 Am. St. Rep. 895, 43 S. E. Rep. 164.

³⁰ *Lange v. Jones*, 5 Leigh (Va.), 192; *Davis v. Settle*, 43 W. Va. 17; *Snowden v. Tyler*, 21 Neb. 199.

sion. It is the nature of the entry or detainer which constitutes the cause of action, and not the title, or claim of title, which the respective parties may have in or to the lands in controversy.⁸¹ It follows, therefore, that in an action of this kind no question of title can arise,⁸² and that a judgment rendered therein is not evidence of title.⁸³

⁸¹ *Carter v. Dorn*, 36 Wis. 289.

⁸³ *Fish v. Benson*, 71 Cal. 428,

⁸² *Newton v. Leary*, 64 Wis. 12 Pac. Rep. 454.
190; *Riverside Co. v. Townsend*, 120 Ill. 9.

CHAPTER II.

FOR WHAT THE ACTION LIES.

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| <p>§ 14. General principles.</p> <p>15. Chattels.</p> <p>16. Water.</p> <p>17. Tenements and hereditaments.</p> <p>18. Lands in hostile possession.</p> <p>19. Partial possession.</p> <p>20. Vacant or unoccupied lands.</p> <p>21. Incorporeal hereditaments.</p> <p>22. Easements.</p> <p>23. Land subject to easement.</p> <p>24. Parts of buildings.</p> <p>25. Mines and subterranean deposits.</p> <p>26. Growing crops.</p> <p>27. Overhanging roof.</p> <p>28. Protruding trees.</p> <p>29. Accretions.</p> <p>30. Burial lots.</p> <p>31. Land in possession of government.</p> | <p>§ 32. Land occupied by semi-public corporations.</p> <p>33. Streets and highways—Individual rights.</p> <p>34. Continued—The rule and its exceptions.</p> <p>35. Continued—Entry under municipal license.</p> <p>36. Continued — Incidental questions.</p> <p>37. Continued—Extent of recovery.</p> <p>38. Dedicated streets.</p> <p>39. Streets and highways—Municipal rights.</p> <p>40. Continued — Parol dedication.</p> <p>41. Turnpikes and toll roads.</p> <p>42. Rights of way—<i>Quasi-public</i>.</p> <p>43. Recovery of right of way by land owner.</p> |
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§ 14 **General Principles.**—By the rule of the common law ejectment will not lie for anything whereon an entry cannot be made, or of which the sheriff cannot deliver possession.²⁴ This rule, in its practical application, is still of controlling force and efficacy and is frequently invoked in controversies arising out of disputed possession, but local legislation in all of the states has done much to extend the common-law scope of the remedy, while judicial construction has still further tended to expand the basis upon which the action rests. The underlying

²⁴ *Hancock v. McAvoy*, 151 Pa. St. 460; *Ezzard v. Mining Co.*, 74 Ga. 520; *Tennessee, etc. R. R. v. East Alabama Ry. Co.*, 75 Ala. 516; *Fritsche v. Fritsche*, 77 Wis. 270; *Burke v. Water Co.*, 176 Ill. 555; *Beatty v. Gregory*, 17 Iowa, 109.

principle of the ancient rule has been preserved, however, and forms the foundation for all of the varied phases which the action may assume, and while, as a general proposition, such action now extends to all rights and interests in land, it must still be understood that the rule has reference only to property, in its own nature, capable of physical detention or possession. The right or interest to be recovered must be of a corporeal nature as distinguished from a mere easement or other purely incorporeal hereditament.³⁵ But where the object of recovery possesses a tangible existence and is capable of physical delivery, the action may be maintained notwithstanding that the right or interest shown may, under the strict rules of law, amount to no more than an incorporeal hereditament.³⁶

It is further to be observed, that it is the character of the property, or interest, which fixes the right to recover in this form of action rather than the ability or non-ability of the sheriff to deliver possession by some physical act, and it is no objection to a recovery that the land in controversy is inaccessible at the time of judgment, so that the sheriff cannot, in fact, deliver possession. If the property is in itself capable of physical detention or possession the action will lie, for delivery by the sheriff is but a subsequent incident following upon the judicial determination of the title.³⁷

It would seem, however, that even at common law an easement, or incorporeal privilege, might be recovered in an ejectment brought for the lands to which it was appendant or appurtenant, provided it was mentioned in the description of the premises. The reason for this would seem to be that as he who has possession of the land has also possession of the easement, the sheriff, by giving possession of the one executes the writ as to the other. This was frequently held in the case of

³⁵ Childs v. Chappel, 9 N. Y. 246; Taylor v. Gladwin, 40 Mich. 232; Caldwell v. Fulton, 31 Pa. St. 483; Dark v. Johnson, 55 Pa. St. 164; Ezzard v. Mining Co., 74 Ga. 520; Fritsche v. Fritsche, 77 Wis. 270; Lee v. Harris, 206 Ill. 428.

³⁶ See Reynolds v. Cook, 83 Va. 817; Integral Min. Co. v. Altoona Min. Co., 75 Fed. Rep. 379.

³⁷ Woodhull v. Rosenthal, 61 N. Y. 382; Perrine v. Bergen, 14 N. J. L. 355.

commons and of those forms of incorporeal hereditaments that usually pass under the name of profits *a prendre*.³⁸

§ 15. **Chattels.**—The action of ejectment lies only for the recovery of land or for something so annexed to land as virtually to become a part of it. In its inception it was strictly a real action, as distinguished from a personal action, and this essential character it has always retained, notwithstanding the practical abolition of old forms. There are many things, however, that fall within the generic name "land" besides the soil. Thus, houses, and erections of all kinds, while in place, are as much land as the ground on which they rest, and, in the old practice, might be specifically declared for. In modern practice, and under our improved methods of land parceling, this is no longer done, a recovery of the described tract including also a recovery of everything annexed to it. If a house, or other annexation, be severed from land, either actually or constructively, it may, and for most purposes generally does, assume the character of a chattel, and may be recovered in an action of replevin.

As the possessor of land may always bring replevin for chattels severed from the freehold, and as the ownership of land draws to it the constructive possession, so it is always permissible for a plaintiff in replevin to show his ownership of the chattel by showing his ownership of the land from which it was severed.³⁹ But this rule can be invoked only where the right of possession is conceded and the title to the land is not drawn in question.⁴⁰ Hence, if the defendant has, or had when the chattel was severed from the freehold, an adverse possession of the land under a claim of title, replevin will not lie to recover

³⁸ Hence, ejectment has been held to lie for first grass (*prima tonsura*), aftermath, pasture for cattle or sheep, the privilege of mining coal, or of drawing brine from a salt well for the purpose of evaporation. A right of fishery was also held to be within the scope of recovery in ejectment. In all of these matters the law recognized a certain de-

gree of possessory interest, and such interest could be recovered if withheld or detained by another. See Adams, Eject., chap. II, for citation of ancient English cases.

³⁹ *Langden v. Paul*, 22 Vt. 205; *Sanders v. Reed*, 12 N. H. 558; *Martin v. Thompson*, 62 Cal. 618.

⁴⁰ *Hines v. Good*, 128 Cal. 38, 60 Pac. Rep. 527, 79 Am. St. 22.

possession by one claiming to be the true owner of such land. The reason for this is that title to land cannot be litigated in an action of this kind.⁴¹

§ 16. **Water.**—It is laid down in the old books that ejectment will not lie for a water-course, or rivulet, even though its name be mentioned, because, it is said, it is impossible to give execution of a thing which is transient, and always running.⁴² When, however, the ground over which the rivulet coursed was the property of the claimant he was permitted to maintain his action and the rivulet might be recovered by laying the action for "so many acres of land covered with water."⁴³

But, it seems, an ejectment might always be maintained for a pool, or pit of water, because these words were held to comprehend both land and water, and, hence, as denoting objects of legitimate ownership. It is doubtful, however, whether ejectment would lie for such things at the present time and under the modern practice. As a general proposition, there can be no property in water in the ordinary meaning of that term. About the full extent of proprietary interest that can be acquired is a usufructuary right; that is, a right of use in connection with land, and, except as it may constitute an incident of land, it does not seem that water may be recovered in this form of action.⁴⁴

But in some of the states, particularly those where water is employed for purposes of irrigation or hydraulic works, it has been held that the action will lie for a ditch,⁴⁵ and under the late modern doctrines now promulgated in some localities, permitting actual and exclusive appropriation of water, the reasons of the common-law rule denying a remedy by ejectment would seem to be inapplicable.

Where the controversy relates only to the right of use of water, as where there has been an alleged wrongful diversion,

⁴¹ *Anderson v. Hapler*, 34 Ill. 436; *Hines v. Good*, 128 Cal. 38; *Powell v. Smith*, 2 Wis. 126; *Mott v. Hayeman*, 8 Cow. (N. Y.) 220.

⁴² *Challenger v. Thomas*, Yelv. (Eng.) 143.

⁴³ *Adams, Eject.* 18. And see *Mitchell v. Warner*, 5 Conn. 497.

⁴⁴ *Richardson v. Railway Co.*, 169 U. S. 128.

⁴⁵ *Integral Min. Co. v. Altona Min. Co.*, 75 Fed. Rep. 379.

notwithstanding questions of title may be incidentally involved, ejectment will not lie. Such rights cannot be properly determined or settled in an action of this kind and the appropriate remedy is an action on the case.⁴⁶ So, too, where there has been an invasion of proprietary right in land by the use or misuse of water, as where one having a right to use the water of a stream in mining operations is prevented by a lower proprietor who builds a dam whereby the water is thrown back upon and submerges the land on which the mining right is situated, ejectment will not lie. In a certain sense there would be a hostile occupation of the upper proprietor's land, or, at least, a deprivation of use, but the remedy would be by action on the case and not by ejectment.⁴⁷ This follows from the fact that ejectment only lies for something whereof the sheriff may deliver possession, and, in a case of this kind, where neither the water nor the land it covers is in the possession of the defendants, it would be impossible for the sheriff, in the execution of a writ, to deliver possession by reducing the water to its former level.

§ 17. **Tenements and hereditaments.**—From what little we can learn of the legal system of England immediately preceding and for some years succeeding the Norman conquest, it would seem that the classifications of the Civilians were to some extent employed and that land was known as immovable property. But, with the extension of feudalism over the country, a new terminology was introduced and after a time lands came to be known as tenements and hereditaments, and these names have remained in the language of the law until the present day. The elementary writers still continue to preserve the old, obsolete, and now comparatively meaningless terms of the medieval lawyers, and the current books give the old definitions of lands, tenements and hereditaments. In the legal system of the United States the two latter expressions are without any special signification. They are, in fact, but archaic survivals and their interest is almost wholly antiquarian.

But in the old days, when to some extent they possessed specific meanings, it was held that ejectment would not lie for

⁴⁶ *Hines v. Robinson*, 57 Me. 329; *Biglow v. Battle*, 15 Mass. 313.

⁴⁷ *Ezzard v. Mining Co.*, 74 Ga. 520; *Burke v. Water Co.*, 176 Ill. 555.

a tenement, because many incorporeal hereditaments were included in that appellation, and therefore the description was not certain enough.⁴⁸ An early American case, however, held to the contrary,⁴⁹ and if the legal lexicographers would tell us just what the word "tenement" means in modern law, it might be that an action would lie for this particular species of real property. If a tenement is only something held, then everything that may be the subject of ownership is included in the term.

The word "hereditament" has scarcely any more legal meaning than its companion word "tenement." In its original application it did not refer exclusively to land but comprehended several forms of chattels, usually known as heirlooms. The learning of the books with respect to these terms, so far as they may be employed in controversies relating to land, is practically valueless. It is still customary for the pleader to declare for the possession and recovery of "the following lands, tenements and hereditaments" but the words, in this connection, are merely terms of art.

§ 18. **Lands in hostile possession.**—The action of ejectment will always lie for the recovery of lands, at the time, in the hostile possession of another. If such possession consists of an actual and exclusive occupancy no question in this respect can arise. By actual occupation is meant a subjection to the will and dominion of the adverse claimant, and this is usually evidenced by personal presence, either by such claimant or those who assume to represent him; by enclosure of a substantial character; by cultivation, or such other use as the land may be susceptible of, depending upon its particular location and quality; and by other continuous acts of ownership.⁵⁰

§ 19. **Partial possession.**—As the primary object of the action of ejectment is to recover possession it follows, on prin-

⁴⁸ Doe v. Denton, 1 T. R. 11. An ejectment for a tenement, with other words expressing its meaning, as a messuage or tenement, known as the Black Swan, was held good, as the addition reduced it to the certainty of a

house. Bradbury v. Yeomans, 1 Sid. 295.

⁴⁹ Osborne v. Woodson, 1 Hawy. (N. C.) 24.

⁵⁰ Coryell v. Cain, 16 Cal. 567; Quicksilver Mining Co. v. Hicks, 4 Sawyer (C. Ct.) 688.

ciple, that the action will not lie, if, at time of its commencement, the plaintiff is in possession of the demanded premises. The integrity of this rule has been in some measure affected by statutory provisions providing for the maintenance of the action for vacant or unoccupied lands, to which a claim of title has been asserted by persons not in the actual occupancy of the same, but, usually, if the owner is in possession and his title is menaced by hostile claims his only remedy is by an action *quia timet* in equity, or by such other anticipatory remedy as the law may provide.

A different question is presented, however, where the owner's possession is only partial, as where some other person is in possession of a portion of the premises or where such person is potentially in possession of all of the land for a special purpose, notwithstanding the owner is also in the general occupancy. Under such circumstances ejectment will lie against the intruder.⁵¹

§ 20. **Vacant or unoccupied lands.**—The original scope of the action of ejectment comprehended only the recovery of lands at the time in the actual hostile possession of another. But with the development of the remedy and its general adaptation as a method of adjusting title as well as of determining possessory rights, the legislature early intervened to supply the deficiencies of the common law by permitting it to lie for unoccupied as well as occupied lands, as against all who might be exercising acts of ownership therein or claiming title thereto. The object of this radical departure from the old rule was to enable parties, while their witnesses were still alive and at command, to settle conflicting rights between themselves and other claimants, without being obliged to take possession and then wait for an action to be commenced by the other parties. The wisdom of the change has been abundantly demonstrated by

⁵¹ Thus, where parties entered into possession of land for the purpose of boring for oil under a lease which was void and incapable of subsequent ratification, it was held that, notwith-

standing the owner was also in possession, he might recover in ejectment. *Buchanan v. Hazard*, 95 Pa. St. 240. And see *Colorado, etc. R. R. Co. v. Smith*, 5 Colo. 160.

years of use and the provision has been incorporated into the statutes and codes of nearly every state.

But while the law as above stated is well settled its application, nevertheless, involves several seeming anomalies. If ejectment was primarily an action to quiet and confirm title the wisdom of the law would be apparent, and in those states where law and equity are administered in the same action possibly there is no incongruity in bringing suit to recover possession of lands upon which a peaceable entry can be made and which, at the time, are not actually in the hostile occupation of another. In effect, however we may otherwise regard it, the law certainly gives a right of action against a party out of possession who only claims title to the land, and, where practical constructions have been given to it, this has been conceded.⁵²

Looking at our subject from the point of view last presented it might seem that where neither party is in actual occupancy of the land and both claim under written muniments, the proper remedy would be a bill to quiet title by removing a cloud. Indeed, this is the usual remedy against a defendant out of possession. There can be no question but that the jurisdiction of equity will always attach, in a proper case, to remove a cloud from the title of the true owner of land. Thus, if the wrongful claim is founded in either fraud or mistake and the rightful owner is so situated that he cannot bring ejectment, a court of equity will assume jurisdiction and grant relief. But the rule is equally well established that where the question involved is purely one of title it can be settled only at law and in the action of ejectment, or its statutory substitute, under the enlarged scope of which persons out of possession, who set up false claims, may now be compelled to submit their claims to test, and thus the title is quieted at law by a verdict and judgment that is conclusive upon all the parties.⁵³

Nor is it necessary that the adverse claim should be asserted by writing or rest on documentary evidence. It is sufficient

⁵² See *Banyer v. Emple*, 5 Hill (N. Y.), 48; *Converse v. Dunn*, 166 Ill. 25; *Burchard v. Roberts*, 70 Wis. 111; *Anderson v. Court-right*, 47 Mich. 161.

⁵³ *Stearns v. Harman*, 80 Va. 48; *Anderson v. Courtright*, 47 Mich. 161; *Shepherd v. Nixon*, 43 N. J. Eq. 627; *Whitehead v. Shattuck*, 138 U. S. 150; *Odle v. Odle*, 73 Mo. 289.

that it has been manifested by words merely.⁵⁴ A parol claim of title is a menace to property and a party should not set up such a claim unless he is prepared to defend it. The claim, however, must be made seriously and in such a manner as to indicate an intention to assert it. A mere idle declaration that a person owns land is not enough.⁵⁵

§ 21. **Incorporeal Hereditaments.**—As has been shown, it was a fundamental rule of the action at common law, that ejectment would lie only for a corporeal hereditament—something of which there could be an actual delivery of possession—and for this reason it was not maintainable for anything which passed only by grant. This rule has frequently been asserted in American cases and the decisions are numerous that the action will not lie to recover a mere easement.⁵⁶

But the rule was infringed in England as early as the time of Henry VIII, when a statute was enacted permitting the recovery of tithes by this form of action, and since then there has been a marked departure from the strictness observable in the ancient common-law rules. In the United States, where the distinction between those things which lie in livery and those which lie in grant was never very strongly defined, and where such distinction, in its original signification, has long ceased to exist, much latitude has been displayed; and while courts, in many instances, have declared that the action will only lie for something whereon an entry can be made, yet the trend, both of judicial decision and legislative enactment, has been to extend the scope of the remedy to nearly every interest in land, or right arising out of same, even though such interest or right may be but an incorporeal hereditament.⁵⁷

⁵⁴ *Banyer v. Emple*, 5 Hill (N. Y.), 48.

⁵⁵ *Banyer v. Emple*, 5 Hill (N. Y.), 48.

⁵⁶ See *Lee v. Harris*, 206 Ill. 428; *Hancock v. McAvoy*, 151 Pa. St. 460; *Dark v. Johnson*, 55 Pa. St. 164; *Child v. Chappell*, 9 N. Y. 246; *Fritsche v. Fritsche*, 77 Wis. 270; *Tennessee, etc. R. R. Co. v. East Alabama Ry. Co.*, 75 Ala. 516; *Ezzard v. Mining Co.*, 74 Ga. 520; *San Francisco v.*

Calderwood, 31 Cal. 589; *Taylor v. Gladwin*, 40 Mich. 232.

⁵⁷ Thus, the grant of a right to quarry and remove limestone from land for a specific purpose, though passing only an incorporeal hereditament, has been held such an interest in the land as would constitute a foundation for an action of ejectment. *Reynolds v. Cook*, 83 Va. 817. Compare *Union Petroleum Co. v. Bliven Co.*, 72 Pa. St. 173.

It would seem also, that in England, where the rule was quite strictly applied, although the action would not lie for a mere incorporeal hereditament to be recovered by itself, yet, where it was appurtenant, it could still be recovered in an ejectment brought for the lands to which it was attached. Thus, it was permitted to sue for land and for a common appendant or appurtenant.⁵⁸ A right to the grass or herbage of land was also sufficient to support the action, upon the theory that he who has a grant of the herbage has a particular interest in the land while the right exists, and an intrusion thereon would be a trespass. In such event the action would not be brought for the land generally but for the particular interest the demandant had in the land or for the thing which gave him, for the time being, a right to its possession.

Nor is there any incongruity or inconsistency in this. It is generally admitted that a profit *a prendre* is something more than an easement; that it contemplates a participation in the profits or products of land, whereas the strict and technical definition of an easement excludes a right to the products or proceeds of land, being a mere right of convenience without profit. While the distinction between a profit *a prendre* and an easement is not always palpable, yet when the privilege is not granted in favor of some dominant tenement it cannot be said to constitute an easement in the proper acceptation of that term, but is rather an incorporeal right of property in the land itself.⁵⁹

The principle involved in the phase of our subject now under consideration seems to have been recognized and applied in this country at a comparatively early day, and a number of cases sustaining the right of a person, not the owner of the fee, to sue for and recover things attached to the land may be found in the old books.⁶⁰ In the modern cases the principle has fre-

⁵⁸ 2 Roscoe, Real Actions, 487; Adams, Eject. 17.

⁵⁹ Post v. Pearsall, 22 Wend. (N. Y.) 425; Waters v. Lilley, 4 Pick. (Mass.) 145. And see Kirk v. Mattier, 140 Mo. 23.

⁶⁰ Thus it was held that, if the owner of land allows another to

erect buildings upon it, under a contract that when the buildings are completed, he will either pay for them or convey the land at his election, ejectment will lie upon ouster of the builder before such election is made. And if a creditor of him who owns the

quently been invoked to protect the rights of licensees. Thus, where a party enters under an instrument in the nature of a lease, although amounting only to a license in fact, he takes such a qualified possession as may be essential to the purposes of the lease, and for a wrongful ouster may bring ejectment.⁶¹

The rule first stated, however, must be taken as the generally received doctrine on this subject, and so strictly has this rule sometimes been construed that rights appurtenant to the principal thing sought to be recovered have been held to be excluded by its operation. Thus, minerals in place may be a proper subject for an action of ejectment, but where the recovery sought is not only for the mineral interest in the land but also for the mining rights therein or appurtenant thereto it has been held that these latter, being strictly incorporeal in their nature, cannot be included in the verdict.⁶² The theory upon which these decisions proceed is, that rights of way over the surface, the right to dig and drive slopes and entries, and other matters of like nature, are strictly intangible and hence incapable of being delivered by the sheriff or of possession by the owner, and that while they are rights for which an action at law for damages will lie in case of denial or interference, or which would be considered by courts of equity, yet from their very nature they cannot be recovered in an action of ejectment.⁶³

fee levy an execution on the land and do not include the buildings in the appraisalment, ejectment will lie by the the creditor of the builder, who has levied an execution on any section of the buildings. *King v. Catlin*, 1 Tyler (Vt.) 355. If a grantor reserve to himself, his heirs and assigns, forever, "the right and privilege of erecting a mill-dam at a certain place described, and to occupy and possess the said premises without any hindrance or molestation from the grantee, or his heirs, etc.," he has such an interest in the land reserved as will support an ejectment. *Jackson v. Buel*, 9 Johns. (N. Y.) 298.

⁶¹ So held where one entered under a lease to operate for oil (*Karns v. Tanner*, 66 Pa. St. 297), and under a right to quarry and remove stone (*Reynolds v. Cook*, 93 Va. 817); under a right to raise minerals. *Kirk v. Mattier*, 140 Mo. 23, 41 S. W. Rep. 252.

⁶² *Louisville, etc. R. R. Co. v. Massey*, 136 Ala. 156, 33 South. Rep. 896, 96 Am. St. Rep. 17.

⁶³ Thus a lease giving to a lessee, to the extent of an undivided interest, the right to enter upon lands and open and work such mines as he may think proper, and the right to cut wood and timber needed in his mining business, gives only a mere in-

§ 22. **Easements.**—While the tendency is toward a liberal application of the rules relating to ejectment, and while many things that might fall within the strict definition of an incorporeal hereditament are now permitted to be recovered in this form of action, yet with respect to mere easements which carry no rights in the soil it would seem that the ancient rules are still in force in all or a majority of the states. Thus, it has frequently been held that ejectment cannot be maintained to recover a right of way across the lands of another.⁶⁴ This follows from the nature of both the original action and its statutory substitute, and the rule applies equally whether the action is brought by or against the holder of the easement. In the latter case, while the land is tangible and something of which possession may be delivered by the sheriff, yet the mere enjoyment of the easement does not constitute an occupation of the premises, neither is the claim of easement a claim of interest in land, or of title thereto, within the meaning of the statute. The question has been complicated to some extent by a failure to distinguish between public and private ways, or between mere easements and that form of property which is generally denominated a public use. The latter are not easements in the proper acceptation of the term and by excluding them from consideration as such much confusion may be avoided. This phase of the subject will receive attention in another place in connection with its cognate matters.

§ 23. **Land subject to easement.**—The mere fact that the land in controversy is subject to an easement forms no bar to its recovery by the owner of the fee,⁶⁵ and it is of no consequence whether the easement be public or private.⁶⁶ In the event of a judgment for recovery the sheriff may give possess-

corporeal right, too indefinite to be enforced in ejectment. *Harlow v. Iron Co.*, 36 Mich. 105. A right to use a wharf for loading, etc., is an easement for which ejectment will not lie. *Child v. Chappell*, 9 N. Y. 246.

⁶⁴ *Fritsche v. Fritsche*, 77 Wis. 270; *Taylor v. Gladwin*, 40 Mich.

232; *Child v. Chappell*, 9 N. Y. 246; *Hancock v. McAvoy*, 151 Pa. St. 460; *Louisville, etc. R. R. v. Massey*, 136 Ala. 156.

⁶⁵ *Blake v. Ham*, 53 Me. 430; *Gardner v. Tisdale*, 2 Wis. 153; *Gordon v. Sizer*, 39 Miss. 805.

⁶⁶ *Tillmes v. Marsh*, 67 Pa. St. 507.

sion subject to the easement.⁶⁷ The question generally arises where the owner of the easement also claims some right or interest in the land over which the easement extends, or has taken exclusive possession thereof, and, when such is the case, ejectment seems to be a proper, if not the only, remedy.⁶⁸

§ 24. **Parts of Buildings—Upper chambers.**—At the present time the action of forcible entry and detainer will generally furnish an efficient and speedy remedy for the recovery of detached buildings, parts of buildings, rooms and chambers. But where the question involved in the detention is one of title this remedy cannot be pursued, and recourse must be had to ejectment. It has always been held that the action will lie for detached buildings or for rooms in buildings, and the old cases show many examples of recoveries of this species of property. It is sufficient if the particular thing sought to be recovered is so described or pointed out that the sheriff has certainty enough to direct him in the execution of the judgment. While actions of this kind are now comparatively rare, yet there would seem to be no technical difficulty in prosecuting such an action, and it has been held that the demise is properly laid in the usual terms employed when declaring for the recovery of land.⁶⁹

A question of greater difficulty is presented where a right is given to build an upper story upon a building belonging to the owner of the land whereon it rests. It has been held, in a case of this kind, that such a grant, even though made in perpetuity, creates only an easement—a mere use—and does not convey such a right as will enable the grantee to maintain an action of ejectment.⁷⁰

⁶⁷ *Tillmes v. Marsh*, 67 Pa. St. 507; *Weisbrod v. Railway Co.*, 21 Wis. 602; *Edmonson Island Case*, 42 Fed. Rep. 15; *Bank v. Morrison*, 88 Me. 162.

⁶⁸ *Bank v. Morrison*, 88 Me. 162, 33 Atl. Rep. 784; *Lott v. Payne*, 82 Miss. 218, 33 South. Rep. 948, 100 Am. St. Rep. 632.

⁶⁹ See *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 771. In this case a complaint alleging that plaintiff at a given time

was the owner and seized and possessed of certain premises, and that the defendant unlawfully entered the second story thereof and ousted and ejected the plaintiff therefrom, and has ever since withheld the possession thereof from him, was held sufficient. See also *White v. White*, 16 N. J. L. 292; *Asheville v. Aston*, 92 N. C. 578.

⁷⁰ *Thorne v. Willson*, 110 Ind. 325, 11 N. E. Rep. 230.

§ 25. **Mines and Subterraneous deposits.**—It is well established that metals, coal, and other minerals, while in place, are fully included in the comprehensive term “land,” and that grants and conveyances of the sub-strata may now be made with the same effect as grants of the surface. Under the early rules of the common law this could not be done, as livery of seizin was an indispensable requisite and in the case of unopened mines, at least, there could be no livery. Hence, proprietary rights of this character were generally regarded as incorporeal hereditaments in the nature of a license. But it would seem that at a comparatively early day ejectment would lie for a mine,⁷¹ which was not regarded simply as a bare profit *a prendre*, but as comprehending the soil itself and hence capable of being delivered in execution; and it would seem that this became the settled rule even though the claimant’s rights were those of a mere licensee, without any title to the soil, for the mine being of a tangible nature and fixed in a certain place, the sheriff would experience no difficulty in making an actual delivery of possession.⁷²

The main idea expressed in the foregoing has been retained in the modern phases of the action and the old distinctions of “corporeal” and “incorporeal” are of but little moment in determining the right of the claimant to maintain the action. The test seems to lie rather in the ability or non-ability of the sheriff to deliver possession by some physical act. In a number of instances courts have refused to distinguish between rights conferred by absolute conveyance and rights derived from a mere license, for even though it be conceded that the right to dig and remove minerals is only an incorporeal hereditament, yet, if the licensee has entered into possession, and particularly where he has expended labor or money, he has such an interest in the land as will enable him to maintain ejectment.⁷³ But, until the licensee has taken possession of some part of the land the trend of opinion would seem to indicate that he has only an indefinite right, for the recovery of which ejectment will not lie.⁷⁴

⁷¹ See *Comyn v. Kineto, Cro.* 116; *Reynolds v. Cook*, 83 Va. Jac. 150.

⁷² *Waddy v. Newton*, 8 Mod. 297; *Kirk v. Mattier*, 140 Mo. 23. (Eng.) 275.

⁷³ *Beatty v. Gregory*, 17 Iowa,

116; *Reynolds v. Cook*, 83 Va. 817; *Karns v. Tanner*, 66 Pa. St.

297; *Kirk v. Mattier*, 140 Mo. 23.

⁷⁴ *Harlow v. Iron Co.*, 36 Mich.

105; *Beatty v. Gregory*, 17 Iowa,

§ 26. **Growing Crops.**—It is a well established principle of law that the term “land” is of indefinite signification embracing not only the substance of the soil but its natural increment as well. Hence, anything growing upon or affixed to the land passes as an integral part of the realty.

It is true, that, for some purposes, growing crops may be considered personal property, to be recovered by an action in proper form, yet, as between the successful plaintiff in an action of ejectment and the evicted defendant, they are unquestionably a part of the land,⁷⁵ and pass with the recovery to the prevailing party.⁷⁶ The reason of the rule seems to rest upon the fact that in law the defendant is treated as a trespasser and hence without any right to plant or cultivate, and even though the crop may have been harvested the rights of the plaintiff will not be impaired and he may still overtake and possess himself of it. This latter doctrine grows necessarily out of that first stated for if the crop in place belonged to the owner of the soil the wrongful act of severing it could not destroy such ownership. Nor will the further fact, that the successful plaintiff may have his action for mesne profits effect his right of ownership to crops grown on the land wrongfully withheld from him.⁷⁷

With respect to the foregoing there are no substantial differences of opinion. A difficult question is presented, however, when we come to consider the right to sue for possession for the purpose of cultivating or harvesting a crop. It is common for parties to enter into agreements for the cultivation of land “on shares,” that is, one person contributing the use of land while another plants and cultivates the crop, which, when harvested, is divided between them. It is well settled that such an agreement does not create a tenancy of any kind on the part of the cultivator. At best, he is only a tenant in common of the crop, which is generally regarded as personalty, and the legal possession of the land is in the owner.⁷⁸ But there may be a law-

116; *Petroleum Co. v. Coal Co.*, 89 Tenn. 381. And see *Caldwell v. Fulton*, 31 Pa. St. 475.

⁷⁵ *Altes v. Hinckler*, 36 Ill. 275.

⁷⁶ *McGinnis v. Fernandes*, 135 Ill. 69; *McLean v. Bovee*, 24 Wis. 295; *Rowell v. Klein*, 44 Ind. 290; *Gardner v. Hersey*, 39 Ga.

664; *Carlisle v. Killebrew*, 89 Ala. 329.

⁷⁷ *McGinnis v. Fernandes*, 135 Ill. 69.

⁷⁸ *Bradish v. Schenck*, 8 Johns. (N. Y.) 151; *Aiken v. Smith*, 21 Vt. 172.

ful occupancy of land without any estate or interest in the occupier and this right was early recognized and protected by the courts which permitted an action of ejectment to be brought for its infringement. Thus, if a man had a grant of first grass grown on land in each year, he might maintain ejectment against anyone who withheld it from him. This was upon the principle that the party entitled to the profits of the land for the time being was also entitled for the same time to the land itself. Reasoning from this principle it would seem that a cropper, notwithstanding his interest is in the crop and not in the land, is yet entitled to such a possession as will enable him to cultivate and harvest the crop, and that if this right is denied it may be asserted by ejectment. The question does not seem to have been raised in the modern decisions. At least, no example has come under the observation of the writer.

§ 27. **Overhanging roof or other projections.**—Not the least among the invasions of proprietary right to which the land-owner in populous localities is often subjected, are the encroachments made by the projecting parts of buildings in the possession of adjoining proprietors. At first blush the questions raised by such encroachments would appear to be simple and easily solved but a review of the authorities leaves them in much doubt and uncertainty. The cases bearing directly upon the point are few in number and contradictory in character and no general rule can be predicated upon them.

It will be remembered that the underlying rule of ejectment is that the action is maintainable only for the recovery of the possession of real property, upon which, in point of fact, an entry can be made, or of which there can be an actual delivery of possession. Now, in view of this rule, there is much show of reason in the contention that has at times been made that, unless the interest is of such a character that it can be held and enjoyed, and the possession thereof delivered in execution of a judgment for its recovery, the action of ejectment will not lie, and that, in case of an invasion or injury of the nature we are now considering, the only remedy is an action on the case as for a nuisance.⁷⁹

⁷⁹ See *Aiken v. Benedict*, 39 v. *Sanderson*, 111 Mass. 114; *Barb. (N. Y.)* 400; *Smith v. Norwalk Heating Co. v. Vernam*, *Wiggin*, 48 N. H. 109; *Randall* 75 Conn. 662.

It becomes a nice question, therefore, as to whether a projection from the land of one party over that of another will constitute an ouster of the latter's possession of his land, or a mere intrusion upon and interference with a right incident to his enjoyment of the same. The question can best be answered by a reference to fundamental principles. It is beyond dispute that land, in its legal signification, has an indefinite extent, upwards as well as downwards, and that the term includes not only the face of the earth, but everything under it or over it. This, at least, is the old and long established doctrine relating to the ownership of realty and while the integrity of the doctrine has, to some extent, been assailed in recent years, it is still of controlling efficacy in the settlement of most questions in which it is involved. Hence, it would seem, that if one party building upon his own land encroaches upon the adjoining land of his neighbor, no question should arise as to the right of the latter to maintain ejectment against the former, and, upon principle, it would further seem, that it is immaterial whether the encroachment is upon the surface of the soil, above it, or below it. In no event should a land-owner be obliged to submit to invasion or compelled to part with his property, or any portion thereof, upon the mere payment of damages by a trespasser.

It has been held, in some instances, that an overhanging cornice is not such a disseizin as will permit the maintenance of the action of ejectment,⁸⁰ and eaves and gutters have been held to come within the same inhibition,⁸¹ the theory being that the possession of the adjoining proprietor remains unaffected, except that it is rendered less beneficial.⁸² But the better considered rule would seem to be that a party is liable in this form of action for a projection of his own roof over another's land,⁸³ or for any projection of the side of a building which, in legal effect, invades the property of another.⁸⁴ And this rule, not-

⁸⁰ *Randall v. Sanderson*, 111 Mass. 114; *Vrooman v. Jackson*, 6 Hun (N. Y.), 326. See, also, *Leprell v. Kleinschmidt*, 112 N. Y. 364, where the question was left undetermined.

⁸¹ *Alken v. Benedict*, 39 Barb. (N. Y.) 400. And see *Rasch v.*

Noth, 99 Wis. 285, 40 L. R. A. 577.

⁸² *Norwalk Heating Co. v. Vernon*, 75 Conn. 662.

⁸³ *Murphy v. Bolger*, 60 Vt. 723.

⁸⁴ In *McCourt v. Eckstein*, 22 Wis. 153, it was held that, where

withstanding that it has failed to obtain universal recognition, certainly seems to be founded in legal reason and good morals. We can readily conceive of cases where the projecting side of a building, like an overhanging cornice, or a bay window, would be of so great inconvenience to the owner of land thus intruded upon that a judgment for damages would afford no adequate compensation, while according to the well settled rules of law relating to land such an erection would create a disseizin rather than a mere infringement of a right. If we are to regard the reason of the remedy as now administered, both in this country and England, then it is by no means essential to its maintenance that the intruding object should actually rest upon the soil, for as the law gives the land-owner an unlimited dominion from the zenith to the nadir there is no reason, resting on principle, why the action should be allowed with reference to one part of his property and denied as to another.⁸⁵ Nor are there any more or greater difficulties in framing a declaration against a projection above the soil than one upon it, neither can there be any question with respect to the ability of the sheriff to deliver possession under a writ.⁸⁶

Where a party occupies to the line of his land, then, notwithstanding his neighbor's eaves or roof may project over same, if no inconvenience is thereby occasioned, it has been held that ejectment will not lie for the intrusion,⁸⁷ and if a foundation wall encroaches on the land of another while this might be regarded as a disseizin, yet if the owner of the land so intruded upon extends his own building to his line, and rests upon such wall, he thereby elects to treat the intrusion as a mere trespass and cannot maintain ejectment therefor.⁸⁸

It will be seen, however, that the question is one of doubt. In those states where it has been specifically passed upon the local rule will furnish a guide. In other states, where it is still

some of the stones of defendant's foundation wall projected eight inches over plaintiff's land, the plaintiff might treat this as a disseizin, rather than a trespass, and might maintain ejectment therefor. But compare *Rasch v. Noth*, 99 Wis. 285.

⁸⁵ *Chamberlin v. Donohue*, 41 Vt. 306.

⁸⁶ *Murphy v. Bolger*, 60 Vt. 723.

⁸⁷ *Rasch v. Noth*, 99 Wis. 285, 40 L. R. A. 577.

⁸⁸ *Zander v. Blatz Brewing Co.*, 89 Wis. 164.

open, the analogies and general principles of law must be relied upon in arriving at a determination. The circumstances of the particular case will, in some instances, serve to indicate the policy to be pursued and the character of the relief that should be granted.

Where the invasion complained of was caused by prior acts of the plaintiff, or those under whom he claims, a different case is presented and different rules will apply. Thus, if a vendor grants lands on which is a house, with cornice and eaves projecting over land retained by him, the grant carries by implication the right to retain the projections in the position they were at the time of the grant.⁹⁹ In such event an easement is created and the burden thereof will continue to impress the land of the grantor, either in his own hands or those of a purchaser from him, in virtue of the oft repeated rule, that where a continuous and apparent easement or servitude is imposed by the owner of land upon one part thereof for the benefit of another part, and the portions are subsequently conveyed to different persons, the purchaser of the servient property, in the absence of an express agreement to the contrary, takes it subject to the easement.

§ 28. **Protruding Trees.**—Closely connected with the general subject discussed in the foregoing paragraph, and bearing a strong analogy thereto, is the question presented where trees, or branches thereof, growing upon the land of one proprietor, protrude upon or overhang the land of another. There is no distinction in principle between artificial erections which encroach upon an adjoining proprietor and natural increment suffered or directed to interfere with his possessory rights or enjoyment of property. It is true that a remedy as for the abatement of a nuisance may be resorted to by the injured proprietor and he may, in proper cases, relieve himself in a summary manner by cutting off the overhanging branches which interfere with his light, air, or view. To this extent the law is well settled and the cases sufficiently numerous to furnish precedents for nearly every exigency that may arise. Indeed the only questions which seem to present themselves in

⁹⁹ *Grace Church v. Dobbins*, 153 Pa. St. 294.

this phase of the subject have reference to the matter of notice, with a preponderance of authority sustaining the position that a land-owner may himself abate a nuisance produced by overhanging trees by removing the projecting parts without notice when the adjoining owner knows, or should know, that they interfere with the full enjoyment of his neighbor's land.⁹⁰

The writer has not been able to find a direct authority with respect to the right to bring ejectment for an invasion of this specific character and the question, when it may arise in practice, must be settled by a resort to the general principles governing the action.

§ 29. **Accretions.**—The rule is general and well settled that accretions of any kind formed upon or against land belong to the owner of such land, who holds same as an incident to the fee. It is a further rule that, when formed, an accretion becomes subject to the same conditions, rights and burdens as the principal to which it is an incident and partakes of the same nature. Hence, if an action lies to recover the principal the incident will accompany it without special mention, and whatever tends to defeat an action for the recovery of the principal will operate equally upon the incident. These are the generally received doctrines and no question can ordinarily arise upon them.⁹¹

It is a familiar principle of elementary law that the owner of land bounded by water, acquires, as an incident of his ownership, whatever increase the land may sustain by gradual and imperceptible accretion. This increase he obtains without price, and the land so formed is held under his title to the contiguous land. On the other hand, he assumes the risk of having his land washed away by the action of the water, and when this occurs it becomes lost. In those states where the riparian proprietor owns only to the water's edge, this will mark the limit of his title, and his line remains always at the water's edge, wherever that may be. As the waters recede and accretions form against his land, his line expands; as the waters encroach

⁹⁰ See Cooley on Torts, 567; Wood on Nuisances, § 112, and cases cited. Also Grandona v. Lovdal, 70 Cal. 161. ⁹¹ See Cobb v. Lavalley, 89 Ill. 331; Lombard v. Kinzle, 73 Ill. 446.

upon and wash away his land, his line contracts.⁹² The only way in which he may regain ownership of land lost by erosion, and whose *situs* is submerged by water, is by the process of accretion to his shore line.⁹³

The question of ownership becomes important where title is asserted to tracts that have reappeared after subsidence and immersion. So long as a vestige of the original tract remains the alluvion formed against it becomes again a part of it. Upon this point there does not seem to be any dispute.⁹⁴ But suppose the entire tract is washed away by the action of a river, which for a time flows over and completely covers the *situs* of the original land. In such event, under the authorities we are now considering, the title to the tract becomes extinguished, or, by some process which the authorities do not clearly explain, has become vested in the sovereignty of the state. Now let us further suppose that by a gradual subsidence of water, or by an equally gradual upheaval of land, the tract becomes dry land again, and is claimed by the former proprietor in virtue of his original grant. In such case, will the claimant become clothed with his former title and may he maintain ejectment for the land? It seems not. This follows from the rule that alluvial formations inure to the benefit of the owner of the coterminous land, and where land not originally riparian becomes so, through gradual changes of the shore line caused by the washing away of intervening land, the right of accretion attaches thereto with the same effect as if it had always been riparian.⁹⁵

A more perplexing question is presented where only a part of a tract is washed away and after a time land commences to reform within the lines of the original grant but not against the shore line, as where an island appears in the stream. If we apply the rule, that the water's edge is the boundary of a

⁹² Cox v. Arnold, 129 Mo. 337; Welles v. Bailey, 55 Conn. 292; Chicago, etc. Canal Co. v. Kinzie, 93 Ill. 415; Boorman v. Sunnucks, 42 Wis. 233; Camden, etc. Land Co. v. Lippencott, 45 N. J. L. 405.

⁹³ Cox v. Arnold, 129 Mo. 337.

⁹⁴ Nalor v. Cox, 114 Mo. 232; Camden, etc. Land Co. v. Lippencott, 45 N. J. L. 405.

⁹⁵ Welles v. Bailey, 55 Conn. 292.

riparian proprietor, then we must say that notwithstanding such island is within the boundaries of the original tract yet, not having formed against the upland, it cannot be claimed by virtue of the original investiture. In such a case the mere production of a deed showing the former grant would be insufficient to prove title, and if no other right to the possession of the land could be adduced an action for the recovery thereof would fail.⁹⁶

On the other hand, where the common-law rule respecting ownership on non-navigable streams prevails, an island forming opposite the upland would belong to the adjacent proprietors and the right of property would be determined by the thread of the stream. In such event the general rules of title would apply and the riparian proprietor, for any encroachment, might bring ejectment as in other cases.

§ 30. **Burial lots and rights of interment.**—The exact character to be accorded to cemetery grounds does not seem to be wholly settled and some diversity of opinion exists with respect to same. Usually, the only rights conveyed or assured by a deed of a cemetery lot is the privilege to make interments in the land described, exclusive of others, so long as the ground shall be devoted to burial purposes. This, it would seem, is not a grant of any interest in the soil. At best, it is only the grant of a license, an incorporeal hereditament,⁹⁷ and while the licensee could, perhaps, maintain trespass for an invasion or disturbance of his rights,⁹⁸ yet the authorities, in the main, seem to hold that a right of sepulture, however exclusive, is not such an interest in land as will support an action of ejectment.⁹⁹

The cases in which the question has been presented, seem, for the most part, to have been between lot-owners and the

⁹⁶ *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. 450.

Gardner v. Cemetery, 20 R. I. 646.

⁹⁷ *Stewart v. Garrett*, 119 Ga. 386, 46 S. E. 427; *Hancock v. McAvoy*, 151 Pa. St. 460, 18 L. R. A. 781; *Kincaid's Appeal*, 66 Pa. St. 411; *Rayner v. Nugent*, 60 Md. 515; *Cemetery Co. v. Buffalo*, 46 N. Y., 503; *Sohler v. Trinity Church*, 109 Mass. 1;

⁹⁸ *Meagher v. Driscoll*, 99 Mass. 281; *Stewart v. Garrett*, 119 Ga. 386.

⁹⁹ *Craig v. Church*, 88 Pa. St. 42; *Hancock v. McAvoy*, 151 Pa. St. 460; *Gardner v. Cemetery Co.*, 20 R. I. 646.

cemetery authorities, and the rule finds its strongest reason in those cases where the cemetery grounds are owned and controlled by a private company which is charged with certain duties relative to the care of the general property. Under such circumstances it will readily be seen that to permit every lot-owner to harass the company with an ejectment suit would utterly subvert the general purpose of the cemetery and disable the company to perform the duties imposed upon it. While conceding the right of the lot-owner to the exclusive use of his lot for the purposes of sepulture, yet such right is not inconsistent with the continued possession of the company, and so long as nothing is done to exclude him from the full enjoyment of such right no action should lie.

But such right is essentially a real property,¹ and notwithstanding it is customary to regard it as an incorporeal hereditament it possesses many of the attributes of a corporeal right. Where the deed of conveyance purports to convey a fee, and, generally, whatever may be the words of limitation if the grant is for rights of burial in perpetuity this will be the case, then a substantial right of property becomes vested in the lot-owner. It is true the use is limited and of a special character, but within this limit, it has been held, the right of possession is perfect, and the fact that the company has the care, management and general superintendence of the cemetery of which the lot forms a part is not incompatible with such possession. Hence, for any invasion of such possession an action for redress will lie,² and possibly, as against a stranger, it might take the form of ejectment.

In some of the cases a tinge of sentiment may be perceived and it has been held that by the employment of a quaint fiction we may regard the fee of a burial lot as belonging to the dead, and, hence, that it would be a desecration of the hallowed precincts to send the sheriff with a writ of possession to disturb the serenity of the place.

§ 31. Land in possession of the government.—The mere fact that the land in controversy is in possession of the govern-

¹ *Field v. Providence*, 17 R. I. 803.

² *Cemetery Co. v. Buckmaster*, 49 N. J. L. 449.

ment by its officers or agents does not preclude an action of ejectment by one claiming the superior right and a person so in possession, when sued in this form of action, must show that the right of the government is paramount to the right of the plaintiff, or judgment will go against him.³

Where the question at issue is one of title the action proceeds as in other cases and the right is determined from the showing of both parties. But the government may be in rightful possession of lands to which it does not assert title, and when this appears the question of title becomes immaterial. Thus, the title of a riparian owner to submerged lands along navigable waters, and his right of access thereto, are subject to the paramount right of the United States to use the lands, without compensation to the owner, in such manner as may be deemed necessary in aid of navigation. For this purpose it may assume possession of submerged lands and erect piers or other improvements necessary to protect navigation, and the land-owner is without a remedy.⁴

§ 32. Lands occupied by semi-public corporations.—Corporations engaged in conducting what are popularly known as public utilities are given certain rights by the state which ordinarily are not enjoyed by other corporations or by natural persons. Among these is the right of exercise, by deputation, of the eminent domain of the state. This includes the right to enter upon and appropriate the land of the citizen against his will, and where the corporation, to whom the exercise of this extraordinary right has been delegated, proceeds according to the directions of the statute the citizen is powerless to stop it and may not interfere with its operations.

But if a railroad company, without condemnation proceedings, enters upon land, and, without the consent of the owner, constructs its roadway thereon, it is not distinguishable from any other trespasser, and the owner may treat it as he would any intruder, and bring his action either for trespass or eject-

³ *Tindal v. Wesley*, 167 U. S. 204; *Scranton v. Wheeler*, 113 Mich. 565; *Polack v. Mansfield*, 44 Cal. 36.

⁴ *Scranton v. Wheeler*, 113 Mich. 565, 67 Am. St. 484; same case, 57 Fed. Rep. 803. And see *Hawkins Point Light House*, 39 Fed. Rep. 77.

ment.⁵ There is, however, a qualification of this rule, where, as in the case of a railroad, the intruder may justify its trespass by a tender of compensation, and it has been held in a case similar to that under consideration, that if the owner of the land has knowledge that the company is proceeding to construct its road over his land, and allows it to do so, thereby involving the expenditure of large sums of money for such purpose, while he may still bring ejectment, yet, if the company is then willing and offers to make just compensation for the land taken, the owner will be estopped from ousting it or interfering with its possession.⁶

It would seem also, that a land-owner who surrenders possession of his land to a railroad company, without prepayment, and by express or implied acquiescence induces the company to expend money in constructing and equipping its road, is thereby estopped from denying the right of the company and cannot afterward maintain ejectment for the recovery of possession. His remedy is confined to damages and compensation on account of the location and operation of the road.⁷ The acquiescence, in such case, is not a waiver of the right of compensation but estops the owner from retaking the land or recovering it in ejectment.⁸

§ 33. Streets and highways—Individual rights—Abutters.

It is laid down in the old books that the owner of the soil may maintain an ejectment for land which is part of the king's highway, because, though the public have a right to pass over it, yet the freehold and all the profits belong to the owner. The

⁵ *Southern Ry. Co. v. Hood*, 126 Ala. 312, 28 South. Rep. 662, 85 Am. St. 32; *Daniels v. Chicago, etc. R. R. Co.*, 35 Iowa, 129; *Terre Haute, etc. R. R. Co. v. Rodel*, 89 Ind. 128; *Kremer v. Chicago, etc. Ry. Co.*, 51 Minn. 15; *Eggleston v. Railroad Co.*, 35 Barb. (N. Y.) 162; Ill. Cent. R. R. v. *Hoskins*, 80 Miss. 730.

⁶ *Southern Ry. Co. v. Hood*, 126 Ala. 312; *Florida, etc. Ry. Co. v. Hill*, 40 Fla. 1, 23 South. Rep. 566, 74 Am. St. 124; *Cohen*

v. St. Louis, etc. R. R. Co., 34 Kan. 158; *Kremer v. Chicago, etc. Ry. Co.*, 51 Minn. 15; *Florida, etc. R. R. Co. v. Hughes*, 105 Ga. 1, 70 Am. St. 17, 30 S. E. Rep. 972.

⁷ *Louisville, etc. Ry. Co. v. Soltwedde*, 116 Ind. 257, 9 Am. St. 852; *McAulay v. Western Vt. R. R.*, 33 Vt. 311.

⁸ *Hendrix v. Railway Co.*, 130 Ala. 205, 89 Am. St. 27, 30 South. Rep. 596.

only limitation upon this right seems to have been that the land should be recovered and possession thereof given, subject to the public easement.⁹ This doctrine was received by the courts of the colonies and afterward reaffirmed by the tribunals of the States, and was for many years administered without a question.¹⁰ The location of a highway over the land of a citizen was always held to confer nothing more than a mere right of way. The title of the original proprietor was not affected; he was at liberty to use the land in any manner not inconsistent with the public right, and if disseized might bring ejectment for its recovery.¹¹

But at the present time the question, as to whether ejectment will lie at the suit of an individual for the recovery of land embraced within the lines of a public thoroughfare, which is in the wrongful occupation of a third person, is one that involves much technical difficulty. The answers that have been returned to the question by the courts to whom it has been presented are not in accord, nor are the same reasons always assigned in the concurring decisions.

It is generally conceded that the owner of lands abutting upon a public way of any kind has certain rights therein peculiar to himself, and which are not possessed by the public generally, and for a violation of which he may maintain an action in his own name, notwithstanding the wrong may also effect public interests. If his access to the way is obstructed there would seem to be no question as to his right to recover damages from the person causing the obstruction for the private injury he has sustained. But the injury may be of such a character that the mere assessment of damages will not afford an adequate remedy and the expulsion of the intruder will alone satisfy the requirements of complete justice. It is contended in some of the cases that this cannot be done under the rules of law; in others that it may. The answers depend, in large measure,

⁹ *Goodtitle v. Alker, Burr.* (Eng.) 133.

¹⁰ See *Stackpole v. Healy*, 16 Mass. 35; *Bolling v. Petersburgh*, 3 Rand. (Va.) 563.

¹¹ See *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447; *Peck v. Smith*, 1 Conn. 103; *Stackpole v. Healy*, 16 Mass. 35; *Bolling v. Petersburgh*, 3 Rand. (Va.) 563.

upon the legal character accorded both to the injured landowner and the intruder, as well as to the public.

§ 34. Continued—The rule and its exceptions.—It is an established inference of the common law that the owners of lands abutting upon a public highway are also the owners of the fee of the highway, and, hence, are entitled to use the same for any purpose not inconsistent with the public rights. In such view the rights of the public are regarded as of no higher dignity than a mere easement,¹² and it seems there is no distinction in this respect between the streets of a city or the highways in the country.¹³ The statute, in some of the states, has somewhat disturbed this inference by providing for a vesting of the fee in the municipality in certain classes of dedications, but with this exception the common-law rules remain intact, and, where the rights of the public are not involved, it has repeatedly been held that the adjoining owner has such an interest in the land lying between his lot and the centre of the street as will entitle him to maintain ejectment against one who ousts him of such use and possession.¹⁴ A contrary rule has been announced in a few cases,¹⁵ but the volume of authority sustains the doctrine first stated, that one who has a freehold of land over which a highway has been laid may recover in ejectment for encroachments made thereon.¹⁶ The reasons for this are apparent. Should a contrary rule be allowed to prevail, then, as pertinently observed by Gray, J.,¹⁷ "any erection short of a nuisance may be made on the roadside in front of the owner's domicile, and the owner would be without com-

¹² *Palatine v. Kreuger*, 121 Ill. 72; *Snoddy v. Bolen*, 122 Mo. 479, 24 L. R. A. 507.

¹³ *Bissell v. Railway Co.*, 23 N. Y. 61. But compare *Montgomery v. Railway Co.*, 104 Cal. 186.

¹⁴ *Wright v. Carter*, 27 N. J. L. 83; *Smeberg v. Cunningham*, 96 Mich. 378, 56 N. W. Rep. 73; *Wager v. Railroad Co.*, 25 N. Y. 526; *Terre Haute, etc. Ry. Co. v. Rodel*, 89 Ind. 128; *Postal Tel. Co. v. Eaton*, 170 Ill. 513;

Thomas v. Hunt, 134 Mo. 392, 35 S. W. Rep. 581; *Woodruff v. Neal*, 38 Conn. 165.

¹⁵ See *Cincinnati v. White*, 31 U. S. 431, 8 L. Ed. 452; *Peck v. Smith*, 1 Conn. 103.

¹⁶ In addition to cases already cited, see *Stackpole v. Healy*, 16 Mass. 33; *Westlake v. Koch*, 29 N. Y. Supp. 283; *Carpenter v. Railroad Co.*, 24 N. Y. 655.

¹⁷ *Etz v. Dally*, 20 Barb. (N. Y.) 32.

plete redress, and the lawless occupant would hold it until the use of the whole road as a highway should be discontinued, unless the public authorities should see fit to remove him."

This is the prevailing doctrine, although, as before remarked, in a few instances it has been held that ejectment will not lie as a remedy to the abutting owner for special injury caused by the permanent obstruction of the highway by a third party. This right has been denied on the ground that a person invoking this form of remedy seeks to be put in actual possession of the land and that the private right of possession being in direct hostility with the public use, the effect of a recovery would be to subject him to indictment for a nuisance, the taking possession subject to the public use being utterly impracticable.¹⁸

While the foregoing contention is not without much force, particularly if we shall regard the public use as being something more than a mere easement, and, in any event, as possessing special features quite distinct from an easement proper, yet neither the reasonings nor the results of this line of cases have secured an acceptance by courts and legal writers, and the proposition first stated must be regarded as expressive of the generally received views.

A different question may arise where the entry is made under a municipal authorization and in states where the exclusive control of a highway is regarded as a paramount right. This phase of the subject will be considered in the succeeding paragraph. In some cases also the question will be complicated by opposing views with respect to the essential character of highways in the country and streets in the city. It is maintained in some of the decisions that there is a wide distinction between the two classes of ways as to the mode and extent of the enjoyment, and, as a sequence, in the extent of the servitude in the land upon which they are located.¹⁹ But, while these distinctions may be allowed effect in some cases, particularly when the intrusion is justified by a municipal license, yet ordinarily where the intruder is a naked trespasser the distinction is immaterial.

¹⁸ See *Cincinnati v. White*, 31 U. S. 431, 8 L. Ed. 452, the leading authority in support of this proposition.

¹⁹ *Montgomery v. Railway Co.*, 104 Cal. 186; *Lafayette v. Jenners*, 10 Ind. 74.

§ 35. Continued—Entry under municipal license.—An interesting phase of the general subject discussed in the preceding paragraph is presented in those cases where the intrusion upon and occupation of a public thoroughfare is by virtue of a license from the municipal authorities. The question, in its practical aspects, is generally raised in the location and operation of railways, and most of the decisions in which the question is involved relate to occupations of this character. Usually, where one enters upon a public street and occupies the same, or a portion thereof, without authority from the municipality, an action of ejectment will lie at the suit of the abutting proprietor. This doctrine proceeds, in part at least, upon the theory, that, as the intruder does not justify under one having a right to possession it matters not to him that another than the plaintiff may have a better right. But, it is contended, where the entry is under a license from the constituted authorities of the public the theory fails, and, as a necessary incident, the right to maintain the action ceases.

Under the decisions which sustain this view the ownership of the street becomes an immaterial circumstance, and notwithstanding the abutter may have title to the fee yet this is subject to the paramount right of the public, through its duly constituted agents, to the superintendence and control of the land as a public way. In pursuance of this right the authorities may permit travel upon the public roads in any manner they may see fit and where a railroad company has constructed its track upon and along a public highway, under a municipal permission, such use and possession is a matter which rests wholly between the authorities and the company, and the right to so occupy and use cannot be questioned in an action of ejectment by the owner of the land over which the public road has been established.²⁰ This is upon the principle that when a way is dedicated to public use it involves use for all legitimate purposes, including such methods for the transportation of passengers and freight as modern science and improvements may

²⁰ *Edwardsville R. R. Co. v. Sawyer*, 92 Ill. 377; *Spencer v. Railroad Co.*, 23 W. Va. 406; *Barney v. Keokuk*, 94 U. S. 324; *Paquet v. Railway Co.*, 18 Oreg. 233; *Gaus v. Railroad Co.*, 113 Mo. 308; *Montgomery v. Railway Co.*, 104 Cal. 186.

have rendered necessary, subject only to municipal control and limitations.²¹ It is further held, in support of the principle, that the establishment of a public highway practically divests the owner in fee of the land upon which it is laid out of the entire present beneficial interest of a private nature which he has therein, leaving in him nothing but the possibility of a re-investment of his former interest in case the highway should be discontinued. This, to a large extent, is a denial of the ancient doctrines concerning the ownership of the fee of public ways and its incident doctrine of diversion, but, it is contended, while the old doctrines may have been applicable where the ownership was merely burdened by a right of way over the land it does not apply to the modern idea of land devoted exclusively to the purposes of a public thoroughfare. In the modern instance, where the control of the way is committed to legally constituted authorities, charged with the duty of maintaining it for exclusively public purposes, the old doctrine, it is said, "becomes a vague theory and should be laid away among the antiquities of the past age."²²

It would seem therefore, under the policy we are now considering, that the holder of title to a public highway, the possession of which is held by the public, as against one who has taken no possession thereof, and is only in the exercise of an easement therein which has been conferred by the municipal authorities in pursuance of their power, and which is valid as to the public, and will expire with the easement of the public, will not be permitted to maintain ejectment for a violation of his property rights, if any, but will be remitted to an injunction to restrain, or, if the injury is consummated to an action for damages, or to proceedings to abate as for a nuisance, as the case may be.²³

§ 36. Continued—Incidental questions.—Involved in the general question of the right to recover a highway in ejectment, are several minor questions growing out of the statutory policy

²¹ *Montgomery v. Railway Co.*, 104 Cal. 186.

²² *Paquet v. Railway Co.*, 18 Oreg. 233. And see *Spencer v. Railway Co.*, 23 W. Va. 406; *Mor-*

ris, etc. R. R. Co. v. Newark, 10 N. J. Eq. 352.

²³ *Montgomery v. Railway Co.*, 104 Cal. 186; *Gaus v. Railroad Co.*, 113 Mo. 308.

of the states with respect to mesne profits, allowances for betterments, etc. These are sometimes urged as additional reasons, why the action should not be permitted to lie in this class of cases. Thus, where the statute permits the plaintiff to recover rents or the defendant to recover for improvements, such provisions appear to be, and indeed are, inconsistent with the rights and obligations of an abutting owner. But these questions, while at first blush formidable, are really of no moment when the legal character of the parties is carefully considered. It is this character and the rights which it involves, that must determine the proper elements of damages. Therefore, it is said, as the owner, in a case of this kind, could not himself apply the land to uses inconsistent with the rights of the public, neither could he authorize others so to do, and hence the rental value could not be recovered by way of damages. So, on the other hand, as the obstructions placed in the street would constitute a public nuisance the defendant could not recover their value under the name of improvements. Nor could the erection of such "improvements" be attended with the good faith which is necessary to enable a defendant in ejectment to recover their value.²⁴ And so both of these questions are disposed of in such a manner as to relieve the court of any embarrassment in pronouncing a judgment of recovery on the main issue.

§ 37. Continued—Extent of recovery.—The question now under discussion, that is, the extent of recovery that will be permitted in case of highways, will arise most frequently, perhaps, in the matter of encroachments by *quasi*-public corporations, particularly those engaged in the building and operation of railroads, or other public utilities, and, in such cases, the solution will often be difficult. It would seem, however, that there is no difference, in principle, between the acts of individuals and of corporations, and where a plaintiff establishes a *prima facie* right to the soil of a street, subject to the public uses, he may maintain an action against any person, natural or juristic, who, without legal right, encroaches upon his freehold.²⁵ The recovery in such case is, of course, subject to the

²⁴ Thomas v. Hunt, 134 Mo. 392, 32 L. R. A. 857.

²⁵ As where a railway company laid tracks in a public street and

way but the mere fact that the fee is burdened by the public use will not effect his right to maintain the action.

The decisions which support this doctrine all rest upon the ancient formula that the owner of soil over which a highway is located is entitled to everything connected with the land for all purposes not inconsistent with the right of the public to a free and unobstructed use of the road or of properly fitting it for the passage of travelers.²⁶ There are decisions which maintain that there is an essential difference between urban and suburban highways, and that the rights of abutters are much more limited in the case of urban streets than they are in the case of suburban ways,²⁷ but there is no good reason for the distinction and, in other cases, courts have refused to make any.²⁸

§ 38. **Dedicated streets.**—The American law of public ways has introduced a new and perplexing feature in what is known as statutory dedication. At common law it is well settled that dedications and condemnations to public uses extend only to the use, the owner having the right to the land for all purposes not inconsistent therewith. While this use possesses many features distinct from an easement yet courts and writers seem to be fairly united in classing it as such and the decisions proceed upon the general theory of easements. As title to the fee and title to an easement vested in different persons may each co-exist in the same thing without in any way conflicting with each other, we can readily understand the rea-

in front of plaintiff's land under a permit from the city council, but without complying with the general law or paying compensation to the land owner; *held*, that the use of the street by the railroad was a new use, imposing an additional burden on the land; that same was a continuing trespass for which ejectment would lie. *Wager v. Railroad Co.*, 25 N. Y. 526. And see *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447; *Stackpole v. Healy*, 16 Mass. 35. In *Postal Telegraph Cable Co. v. Eaton*, 170 Ill. 513,

a like holding was had with respect to a telegraph line constructed and maintained upon a public highway.

²⁶ *Cole v. Drew*, 44 Vt. 49. And see *Eels v. Telegraph Co.*, 143 N. Y. 133, 38 N. E. Rep. 202; *Reichert v. Railroad Co.*, 51 Ark. 491, 11 S. W. Rep. 696.

²⁷ See *Kincaid v. Natural Gas Co.*, 124 Ind. 577; *Postal Tel. Co. v. Eaton*, 170 Ill. 513; *Montgomery v. Railway Co.*, 104 Cal. 186, 43 Am. St. 89.

²⁸ *Bissell v. Railway Co.*, 23 N. Y. 61.

sonings of the courts when they decide that each owner should have all remedies necessary and appropriate for securing their enjoyment, and hence, that when the right of the owner of the fee is invaded by a third person the wrong should be abated by that form of action which seems best suited to afford complete redress.

But the statute now in force in many states provides in terms that when a dedication is made in a certain manner, as by plat duly acknowledged and filed, it shall operate as a conveyance to the municipality of the fee of such parcels as are therein expressed to be or are intended for public use. This grant is usually qualified, however, by a proviso that the land shall be held by the municipality in trust and for the uses named or intended and for no other use or purpose. In construing these statutes the courts have uniformly held that a fee passes by the dedication,²⁹ but certainly not a fee in the usual and ordinary legal acceptance of that term.³⁰ In fact the interest thus conveyed is practically a new form of estate for which neither courts nor legal lexicographers seem, as yet, to have been able to find a name. Nor are the courts agreed upon the ultimate disposition of the title in case of vacation, and it is this feature which presents the greatest technical difficulty in determining the right of an abutting proprietor to maintain an action of ejectment.

It is contended in some of the decisions that the statute has not materially affected the operation of the ancient rule that abutting proprietors own to the centre of the street. While it is conceded that by the act of dedication a fee passes out of the dedicatōr and vests in the municipality, yet this is but a trust, the effect of which is to secure to the public an easement, and to the abutting owners, respectively, the beneficial right in the land to the centre of the way.³¹

§ 39. **Streets and Highways—Municipal rights.**—It has been held in a number of instances that a city, or municipal cor-

²⁹ *Reid v. Board of Education*, 73 Mo. 304; *Maywood v. Maywood*, 118 Ill. 61.

³⁰ *Field v. Barling*, 149 Ill. 556.

³¹ See *Snoddy v. Bolen*, 122 Mo. 479, 24 L. R. A. 507; *Thomas v. Hunt*, 134 Mo. 392, 32 L. R. A. 857; *Chicago, etc. Ry. Co. v. Quincy*, 136 Ill. 563.

poration, has no such a valid subsisting interest in the lands embraced in its streets as will authorize it to maintain an action of ejectment therefor.³² But this doctrine has been denied in other cases and the contrary rule announced that such action will lie to recover possession of streets, to the use of which the city is entitled.³³ The volume of authority seems to favor the latter proposition, and, except in case of a turnpike in control of private parties, the general rule would seem to be that a right to maintain ejectment against persons encroaching upon a public highway is lodged in and may be exercised by the local municipal authorities.

The differences of opinion which seem to exist, with respect to the exercise of the right on the part of the municipal authorities, grow out of the application of the old rules that the interest of the city is an easement and that ejectment will not lie for a mere easement; hence, as no delivery can be made, no recovery can be had.³⁴ The vice of the reasoning in this class of cases seems to lie in the misuse or misinterpretation of the word "easement." In legal strictness the right of the public to occupy a street or highway is not an easement, but a distinct species of property which we may classify as a "public use." Incident to the same is the right of the municipality to regulate such use, and for such purpose it requires and is accorded the possession and control of the soil. Under such circumstances it is immaterial whether the fee be vested in the municipality or retained by an individual, and the recovery, if any is had, must be for the land itself and not for some intangible or naked right annexed to the land. Even though it be conceded that ownership is vested in an individual and that all that is held by the public is a use, yet, by the act of dedication or condemnation in addition to the right of use there passes such an interest in the land as may be necessary for the enjoyment of that use by the public,³⁵ and this right of possession, use and

³² *Grand Rapids v. Whittlesey*, 182 Ill. 382; *Lee v. Harris*, 206 Ill. 428.

³³ *Freking*, 8 Bush (Ky.), 121; *Racine v. Crottsenberg*, 61 Wis. 481.

³⁴ *San Francisco v. Sullivan*, 50 Cal. 603; *Visalia v. Jacob*, 65 Cal. 434; *Chester v. Railroad Co.*, 41 L. R. A. 335; *Paquet*

³⁵ *San Francisco v. Grote*, 120 Cal. 59, 41 L. R. A. 335; *Paquet*

control, has frequently been declared to be a legal and not a mere equitable right.⁸⁶

Where the fee of a public street is vested in the municipality ejectment may always be resorted to as a proper remedy to recover same from one who encroaches thereon.⁸⁷ This never seems to have been doubted.

§ 40. **Continued—Parol dedication.**—The rule is well settled that in ejectment the legal title to land cannot be shown by parol, and this rule raises an interesting question where a municipality resorts to this form of action to recover possession of land claimed under a dedication resting wholly in parol. It has been held, in a suit against the owner of the fee, that where a dedication can be shown only by parol testimony of the acts and declarations of the owner and the use of the land by the public, the title is insufficient to support the action.⁸⁸

§ 41. **Turnpikes and Toll Roads.**—Even where it is conceded that the right to maintain ejectment against persons encroaching upon a public highway belongs to the local municipal authorities having charge of the road, the right is denied in the case of a turnpike or toll road in the control of a private corporation. This has been held to be the rule even though the municipality may have over the road certain prescribed powers, which, if possessed over an ordinary highway, would create, by implication, a right to maintain the action.⁸⁹

§ 42. **Rights of way—Quasi-public.**—Closely connected with the subjects discussed in the paragraphs immediately preceding, are the privileges secured to common carriers in special rights of way. It is undeniable that a mere right of way has ever been regarded as an easement, and is always cited in the elementary books as a conspicuous example of an incorporeal hereditament. But the old ideas respecting rights of way have

v. Railway Co., 18 Oreg. 233; Ill. 382; Lee v. Harris, 206 Ill. 428.

Klinkener v. McKeesport, 11 Pa. St. 444.

⁸⁶ Chicago v. Wright, 69 Ill. 318; Visalia v. Jacob, 65 Cal. 434; San Francisco v. Grote, 120 Cal. 59; Church v. Hoboken, 33 N. J. L. 13.

⁸⁸ San Francisco v. Grote (Cal.), 36 L. R. A. 502, 47 Pac. 938. And see San Francisco v. Grote, 120 Cal. 59, 41 L. R. A. 335.

⁸⁹ Chambersburg v. Manko, 39 N. J. L. 496.

⁸⁷ Chester v. Railroad Co., 182

been materially modified in recent years and much of the old doctrine has been rejected. The introduction of new methods of travel, and particularly the building of railroads, has necessitated changes in the old law and the application of different principles from those in force when ways first became subjects of legal cognizance.

Particularly is this true of the law relating to highways. The railroad, in legal contemplation, is a public highway, but it is not a highway in the old sense of the term. So too, the right of passage over the land comprised in the road is still an easement, yet it differs in many respects from the old definition. In the solution of the questions raised by an intrusion upon a right of way we find a new element for which the old law makes no provision, and with respect to which the old precedents do not apply.

The operation of a railroad necessarily contemplates that the operator shall take and keep an actual possession of the right of way, and, to render such operation safe and effective, such possession must be exclusive of all other persons, except where such right of way may cross another highway. This right of possession, which is included in the grant or condemnation, is something more than a mere easement as that term is usually defined. It is, in fact, a substantial right of property, for which the law as yet has failed to give us a distinct name. It is not in all respects, a public use, since it is held by a private corporation for purposes of pecuniary gain, but being for public utility it partakes of the nature of a public use and the franchise is granted upon this idea. At all events a right of possession, lawfully acquired, has been held to constitute a legal right sufficient to support an action of ejectment against any person intruding upon the right of way.⁴⁰

§ 43. **Recovery of right of way by land owner.**—As we have seen, a railroad, in one sense, is a public highway, and the construction thereof over land by the consent of the owner, or after condemnation, as the case may be, is a virtual dedica-

⁴⁰ Cent. Pac. R. R. Co. v. Bently, 15 Saw. (C. Ct.) 118; Tennessee, etc. R. R. Co. v. East. Ala. Ry. Co., 75 Ala. 516; Burton v. Laughrey, 18 Mont. 43.

tion of the land to a public use. In such event the operation of the road is in the interest of the public and cannot be interrupted by an action to recover possession of any part thereof in the interest of a private person.⁴¹

Where the company has entered upon land without right it occupies no better position than any other trespasser, and ejectment will lie to recover possession by the land owner.⁴² In some of the cases, however, distinctions are made, or attempted, between entries by a company possessing a franchise as a common carrier and mere naked trespassers, and where the company offers to make compensation the right of recovery will be denied.⁴³ This phase of the subject will be more fully treated in others parts of the work. It has further been held that in case of an unlawful entry the land owner should at once peremptorily forbid such entry if he intends to dispute it, and that by mere inaction, where he is cognizant of the fact, he may be considered as having condoned the injury and will be precluded from treating the company's possession as tortious.⁴⁴

Where the company enters by consent of the land owner, or under agreements for compensation, or by virtue of any other stipulation or promise on the part of the company, then, notwithstanding a failure to comply with such agreements or stipulations, the remedy of the land owner will be confined to an action for compensation.⁴⁵ In all cases acquiescence for a considerable period after the railroad company has entered upon its duties will defeat an action to recover possession.⁴⁶

⁴¹ *South. Cal. Ry. Co. v. Slau-son*, 138 Cal. 342, 94 Am. St. 58, 71 Pac. 352.

⁴² *Ill. Cent. R. R. Co. v. Hoskins*, 80 Miss. 730, 92 Am. St. 12, 32 So. 150; *Daniels v. Railroad Co.*, 35 Iowa, 129; *Terre Haute, etc. R. R. Co. v. Rodel*, 89 Ind. 128.

⁴³ *Hendrix v. Railway Co.*, 130 Ala. 205, 89 Am. St. 27, 30 So. 596.

⁴⁴ *Mitchell v. Railroad Co.*, 41 La. Ann. 363, 6 So. 522; *Cairo, etc. R. R. Co. v. Turner*, 31 Ark. 494; *Indiana, etc. R. R. Co. v. Allen*, 113 Ind. 581; *Fresno St. R. R. Co. v. South. Pac. R. R. Co.*, 135 Cal. 202.

⁴⁵ *South Cal. Ry. Co. v. Slau-son*, 138 Cal. 342, 94 Am. St. 58, 71 Pac. 352.

⁴⁶ *Fresno St. R. R. Co. v. South. Pac. R. R. Co.*, 135 Cal. 202.

CHAPTER III.

WHEN THE ACTION MAY BE BROUGHT.

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| § 44. Generally considered. | § 55. Statutes of limitation. |
| 45. Disseizin of plaintiff. | 56. Within what time action must be brought. |
| 46. Defendant's possession. | 57. When right of action accrues. |
| 47. Condition broken. | 58. Persons under disability. |
| 48. Remainders. | 59. Heirs and successors of persons under disability. |
| 49. Reversions. | 60. Prevention of suit by paramount authority. |
| 50. Leaseholds. | 61. Lands sold for taxes. |
| 51. Continued—Forfeitures. | |
| 52. Continued—Statutory provisions. | |
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| 54. When right of entry is lost. | |

§ 44. Generally considered.—In the chapter immediately preceding an attempt has been made to show the specific thing—the *corpus*—that may be recovered in an action of ejectment. The present chapter will be devoted to a brief consideration of those matters which permit the institution and maintenance of the action. This will include both the cause of action and the time within which suit must be brought. The treatment is necessarily brief from the reason that most of the topics will receive attention in other connections during the progress of the work.

As ejectment is now a statutory action in all of the states it follows that reference must be made to the statute to determine when the action lies. With the exception of the periods limited for an entry upon lands the statutory provisions are meagre and general in their statements. When the old action was abolished by the legislature of New York and a new procedure was authorized by the revised statutes of that state in the year 1830, it was enacted, that, "the action of ejectment is retained, and may be brought in the cases and the manner heretofore accustomed, subject to the provisions hereinafter con-

tained," and this clause, with scarcely any alteration, was adopted by the other states and still forms the opening section of the act concerning ejectment in most of the codes of the present day. The same law also provided that the action may be brought "in the same cases in which a writ of right may now be brought by law, to recover lands, tenements or hereditaments; and by any person claiming an estate therein, in fee or for life, either as heir, devisee or purchaser," and this clause has also shown a wonderful persistency of survival as may be seen by reference to local statutes. The scope of the clause has been generally extended to include estates for years, but otherwise it has been re-enacted without material alteration. The original act further permitted the recovery of dower in this form of action, but this provision, except in a few states, has been rejected.

In the states carved out of the public domain a further provision has been added for the benefit of persons who have acquired possessory rights from the United States or from the state, and which permits actions to be brought by such persons against those who have invaded the rights so acquired. This is practically the full extent of the statutory provisions upon the subject, from which it will be seen that the rules, definitions and formula of the common law are still of much efficacy and in many cases must still be resorted to for the determination of such questions as may arise.

As the person in possession of lands is presumed to be the owner thereof, until the contrary has been shown, it follows that the claimant in ejectment must show a superior title in himself in order to recover from the defendant, and, in addition, must have a right to the present possession. That is, he must have a right of entry upon the lands in controversy at the time of the demise laid in the declaration, and whatever takes away this right of entry will deprive him of his remedy by ejectment, notwithstanding he has the legal title.

Again, to maintain the action the claimant must not only have a right of entry, or right to immediately possess and enjoy the land in question, but such possession must be wrongfully or unlawfully withheld from him, and, generally, these facts are matters both of allegation and proof. When both of

these facts appear, and the action is brought in apt time, a *prima facie* case is presented.

The time within which the action must be brought is fixed by statute in all of the states. This statute, in its essential features, is modeled after the English statute of 21 James I., but the periods of limitation are widely variant and are often made to depend on special circumstances. The effect of limitation upon title will not be touched, that phase of the subject being reserved for more ample treatment in connection with adverse possession.

§ 45. **Disseizin of Plaintiff.**—To authorize the institution of an action of ejectment the plaintiff must have been wrongfully disseized of the lands in controversy, which, at the time suit is commenced, must be held by another in hostile possession. The old writers distinguished between a disseizin and a dispossession, holding that the former is where an estate is acquired by wrong and injury, while a dispossession may be either right or wrong,⁴⁷ but at present whatever of special technical significance the word "seizin" formerly possessed is lost. Disseizin and dispossession have come to mean pretty much the same thing, and for all practical purposes they are interchangeable terms.⁴⁸ It is immaterial how the adverse claimant may have entered and it is enough that he wrongfully withholds the possession. His original entry may have been rightful while his subsequent possession may have developed into a tortious holding, or he may have been a trespasser from the start. In any event, his wrongful detention of the possession is the gravamen of the action and when this is shown the right of the plaintiff to bring suit is established.

§ 46. **Defendant's possession.**—As previously stated, to maintain the action of ejectment it must be shown that the lands in controversy, at the time suit is commenced, are in the hostile possession of another. This ancient rule has been much relaxed in modern times by legislative enactment as well as judicial construction, but the essential idea has been retained and still forms a salient feature of the action. That is, there must

⁴⁷ Per Kent, J., in *Smith v. Burtis*, 6 Johns. (N. Y.) 217.

⁴⁸ *Small v. Procter*, 15 Mass. 498.

be a deprivation of possession of some sort, even though it is only constructive, or such assertions of title, in the case of unoccupied lands, as amount to a denial of a right of entry.

Where the defendant is in the actual, open, exclusive possession of the land, no question as to the right to institute the action can arise, but, as a general proposition, any subjection of land to the dominion of an individual, who claims as owner, will constitute a hostile possession sufficient to enable an adverse claimant to maintain ejectment against him. Actual occupation in person, or by agent or servant, is not essential, for, as just remarked, possession of land consists in subjecting it to the will and dominion of him who claims the right to exercise acts of ownership, and this may be evidenced in many ways.⁴⁹ What particular things are indicative of possession cannot be stated by an inflexible rule, but will vary with locality, the nature of the land, and the uses to which it may be applied.⁵⁰

§ 47. **Condition broken.**—Ejectment will generally lie for condition broken, where such condition has been preserved by deed. It is fundamental that a grantor may annex to his grant any condition that he may see fit so long as the beneficial enjoyment of the estate conveyed is not materially impaired, and where contracts of this kind are freely and voluntarily entered into they will be enforced by the courts. About the only restriction upon this right is, that such conditions shall not be in violation of public policy or subversive of public interests. The subject will necessarily present itself in other parts of this work in connection with other nearly related subjects, and, for this reason, can only receive passing notice here. Suffice it to say, that if a condition is imposed in good faith, violates no principle of public good, and is not repugnant to

⁴⁹ *Quicksilver Mining Co. v. Hicks*, 4 Sawyer (C. Ct.), 688; *Courtney v. Turner*, 12 Nev. 345.

⁵⁰ Maintaining a bridge, one end of which springs from a small strip of land on the bank of a creek, under a claim of ownership of the strip, is sufficient evidence of possession to war-

rant ejectment. *Quicksilver Min. Co. v. Hicks*, 4 Sawyer (C. Ct.), 688. The driving of piles into the ground covered by a mill-pond belonging to another has been held to constitute a disseizin. *Boston Mill v. Bulfinch*, 6 Mass. 229.

the estate granted, it will be valid and enforceable, and, if accompanied by a proviso of forfeiture and re-entry, ejectment will lie for the recovery of the land after a breach.⁵¹

The legal effect of a condition subsequent is to work a forfeiture in case it is violated. At common law, however, the condition was not self-executing but required some action on the part of the grantor, evincing an intention on his part to take advantage of the forfeiture, and, unless he was actually in possession, this was accomplished by a re-entry upon the land conveyed. The earlier cases in this country follow the common-law rule and announce the doctrine that re-entry for breach of a condition subsequent is necessary to defeat an estate of freehold which has once vested, and that a forfeiture cannot be effected merely by bringing an action for the recovery of possession.⁵² Under this doctrine it will be seen that ejectment will not lie until there has been an actual re-entry. But later statutory enactments, defining the character of the action of ejectment and providing for the interests that shall be sufficient to sustain it, have materially altered the old rule by removing much of the reason which occasioned it, and it is no longer necessary that the common-law ceremony of a re-entry shall be performed as a condition precedent to the prosecution of an action to recover possession of lands affected by a forfeiture.⁵³

Where the condition is express it is not necessary, as a general proposition, that the right of re-entry should be reserved in the deed of conveyance, as such right follows as a neces-

⁵¹ Certain lots were sold with a condition which provided that no building should ever be erected thereon in which grain was handled, and that no grain should ever be handled on the land. In case of breach the land to revert to grantor. A grain elevator was subsequently erected by the grantee; *held*, that ejectment would lie. *Wakefield v. Van Tassell*, 202 Ill. 41, 66 N. E. 830, 95 Am. St. 207;

Martin v. Railway Co., 37 W. Va. 349, 16 S. E. Rep. 589.

⁵² See *Spear v. Fuller*, 8 N. H. 174; *Thompson v. Thompson*, 9 Ind. 323; *Frost v. Butler*, 7 Greenl. (Me.) 225.

⁵³ *Plumb v. Tubbs*, 41 N. Y. 442; *Cornelius v. Ivins*, 26 N. J. L. 376; *Ruddick v. Railway Co.*, 116 Mo. 25; *Sioux City, etc. R. Co. v. Singer*, 49 Minn. 301; *Ruch v. Rock Island*, 97 U. S. 693; *Stearns v. Harris*, 8 Allen (Mass.), 597.

sary incident and binds the land into whosoever hands it may come,⁵⁴ and when the condition is broken ejectment for possession will lie.⁵⁵ But, in order to maintain the action the grant must be strictly upon condition, for mere provisos, restrictions, or collateral contracts will not confer the right to sue for recovery on breach or non-observance. The remedy, in such case, is by suit for specific performance or an action for damages.

§ 48. **Remainders.**—The general rule is, that no cause of action accrues to a remainderman until the death of the life tenant or other determination of the precedent particular estate, and, as a right of immediate possession is an indispensable requisite to the maintenance of the action of ejectment, it follows that suit cannot be brought by the owner of the remainder so long as the precedent estate exists.

The statute, in some states, has modified the doctrine above stated and while it has not given a remainderman a right to bring a possessory action has yet conferred upon him a power to test the validity of conflicting claims by action, during the pendency of the precedent estate. The action given has no real analogy in the law. It resembles, in some respects, the equitable proceeding of *quia timet*, but as that action can only be brought by one in possession,⁵⁶ the resemblance is not perfect. Its object seems to be to provide a speedy way for settling disputed questions of title by one out of possession, and without right of present entry, both as against those in possession and others, and it seems to proceed upon the theory that the welfare of those interested, as well as the public in general, will be best subserved by providing a means whereby apprehended litigation affecting the use and enjoyment of land may be at once settled.⁵⁷ Where this law obtains action may be

⁵⁴ Osgood v. Abbott, 58 Me. 73; Bowen v. Bowen, 18 Conn. 535; Fonda v. Sage, 46 Barb. (N. Y.) 109.

⁵⁵ Ruddick v. St. Louis, etc. Ry. Co., 116 Mo. 25; Raley v. Umatilla County, 15 Oreg. 172; Sioux City, etc. R. R. Co. v.

Singer, 49 Minn. 301; Martin v. Railway Co., 37 W. Va. 349.

⁵⁶ Clay v. Hammond, 199 Ill. 370.

⁵⁷ Murray v. Quigley, 119 Iowa, 6, 92 N. W. Rep. 869, 97 Am. St. 276. And see Force v. Stubbs, 41 Neb. 271; Halland v. Challen, 110 U. S. 15.

brought at any time without respect to the matter of possession, and it has been held that where there is no disability, and where the facts upon which the apprehended litigation will rest are fully known, such questions must be settled within the statutory period.⁵⁸

At common-law a forfeiture might be declared against life tenants by curtesy or dower, and this right has not been altogether abrogated by modern codes. The courts, however, show a reluctance in enforcing this right and generally a remainderman is not entitled to claim immediate possession as a result of a forfeiture unless there has been both permissive and voluntary waste committed wantonly and in a manner showing an utter disregard of the rights of the next taker.

§ 49. **Reversions.**—The general rules respecting remainders apply with equal force to reversions, and until the falling in of the estate in reversion no action can be maintained by the person holding the reversionary rights. If the reversion may be accelerated by forfeiture, as is sometimes the case, the action for recovery may be brought on the forfeiture in the same manner as other actions for a breach of condition subsequent. Rights of action for the recovery of a reversion occur most frequently in the case of leases for years, and this phase of the subject will receive attention in the succeeding paragraph.

Where no question of forfeiture is involved the general rule is as first stated and until the determination of the particular estate the reversioner, having no right of entry, can maintain no action for the recovery but is limited to his action for waste, or such other actions as the law may provide for the protection of his reversionary interests.

§ 50. **Leaseholds.**—The earlier works on the subject of ejectment, both in England and America, devote much space to the relation of landlord and tenant and to the application of the remedy in the solution of questions growing out of such relation. But while the action may still be resorted to by a landlord, to recover possession of his lands from a refractory

⁵⁸ *Murray v. Quigley*, 119 Iowa, 6. In this case action was de-ferred for thirty years; *held*, that it was barred by limitation.

tenant who refuses to vacate after the determination of his tenancy, yet it is now but seldom employed, where no question of title is involved, and the speedier, and, in many respects, more effective, remedy of unlawful detainer has quite generally superseded other methods.

During the continuance of the lease a landlord is without right to maintain ejectment, for it is fundamental that to sustain the action there must be not only a right of property but a right of possession as well. This right of possession the landlord segregates from his general proprietary interest, or, as we usually term it, his ownership, when he executes a lease and the term which he thereby creates carries with it this segregated right to the possession and profits of the land. In order, therefore, that he may resort to the remedy of ejectment it is essential that the term should cease.

A tenancy may be determined in several ways, as by its own expiration through the effluxion of time; or by the happening of a particular event on which it is limited; or by a breach of some condition annexed to the lease; or, in some cases, by the landlord's election evidenced by a notice to quit. It is not proposed to review here the fundamental rules relating to landlord and tenant nor the character and qualities of estates less than freehold, but, as incidental to our main subject, we must necessarily glance at some of the phases which they present in this connection. The general rule is, and it seems always has been, that, when a term expires by its own limitation, whether by lapse of time or the happening of a particular event, an action will at once lie to recover possession, and this too without any demand of possession or notice to quit.⁵⁹

As a general proposition, a tenancy at will may be terminated any time and without previous notice to quit,⁶⁰ but this species of tenancy has now practically developed into a tenancy from year to year, and when such is the case it can be determined only by a proper notice.⁶¹ The statute fixes the character and

⁵⁹ *Secor v. Pestana*, 37 Ill. 525;
Alcorn v. Morgan, 77 Ind. 184.

⁶⁰ *Herrell v. Sizeland*, 81 Ill.
457.

⁶¹ *Hunt v. Morton*, 18 Ill. 75.

extent of this notice and the method of its service. But when such form of tenancy has been regularly terminated the action will lie as in other cases. The uses and requisites of a notice to quit are so important, however, that their further consideration seems necessary, yet this duty can more advantageously be performed by discussing them in connection with their cognate matters and hence they will not further be adverted to at this time.

§ 51. **Continued—Forfeitures.**—A termination of a tenancy for breach of condition presents more difficulties, yet, as the old ideas which formerly characterized this procedure have largely been discarded, the matter has been relieved of much of its complexity. Under the old rule it was necessary to make an actual entry upon the land before an action of ejectment could be maintained therefor, and the claimant's title was required to be of such a nature as to render his entry legal. When, therefore, a lease for years was given and the immediate right of possession thereby transferred to the tenant, the landlord could not legally enter upon the land during the continuance of the term, and, as a consequence, was without remedy to recover back his possession while the term lasted, even though the tenant should neglect to pay his rent or otherwise disregarded the conditions of his grant.⁶² But after a time, when terms increased in value and in length, this was felt to be a serious evil. Thus, the tenant might be insolvent and hence an action on the covenants would be useless, or the lands might be left without sufficient to enable the landlord to levy a distraint to countervail an arrear of rent. To overcome these difficulties it then became customary for landlords to insert in their leases certain provisos and conditions to the effect that, if the rent should remain unpaid after it became due, or if any other of the particular covenants of the lease should be broken by the lessee, the term should thereupon become forfeited, and the landlord, in such cases, was empowered to re-enter and again possess his lands. These conditions continue to be used in modern leases, in much the same language as in their ancient forms. Although the actual entry is no longer required the

⁶² Adams, Eject. 146.

right to make such entry is still necessary, and the power of re-entry thus reserved to the landlord, in case the rent shall remain in arrears for a certain time after it is due, is the most common proviso upon which ejectments for forfeitures are founded.

But, while the right of re-entry in case the rent shall remain in arrear for a certain time after it has become due, is the most common proviso upon which ejectments for forfeitures are founded, yet it is also customary to reserve the right for the breach of other conditions. In every such instance it is necessary that the breach complained of should come within the exact terms of the condition, as in case of doubt or uncertainty the general rule must apply, that the grant shall be construed with most favorable intendments for the grantee.

§ 52. **Continued—Statutory provisions.**—The statute has further come to the aid of the landlord, in case of arrearages of rent, by giving to him, without any formal demand or re-entry, a right to commence an action of ejectment against the tenant for the recovery of the demised premises in all cases where a half-year's rent shall be due and unpaid. The object of the statute,⁶³ however, is the recovery of rent, and a saving proviso generally permits the tenant to avoid the effect of the action by a payment or tender of the arrearage at any time before final judgment. The statute does not destroy or take away the landlord's right to create a forfeiture by the common-law method but merely affords a cumulative remedy.⁶⁴

In practice this remedy is seldom resorted to as, in most of the states, a more speedy and summary remedy is provided in connection with the action of unlawful detainer. When the primary object is the recovery of the land it is not of much value as the tenant may always defeat a recovery by payment of the rent in arrears.

§ 53. **Dower.**—By the rules of the common law a widow's claim for dower cannot be asserted in ejectment. The reason for this is obvious for notwithstanding the dower may

⁶³ First passed 11 Geo. II, c. 19, and substantially re-enacted in most of the states.

⁶⁴ *Chadwick v. Parker*, 44 Ill. 326.

have become consummate, yet, until it has been admeasured and specifically assigned there is no part of the lands upon which it can rest. There seems to have been an apparent exception to the rule in the case of what was known as free-bench, as where there was a custom in a manor that a widow should enjoy, during her widowhood, the whole or a part of the customary lands whereof her husband died seized. In such cases she might maintain ejectment for them. But this, it is said, was an excrescence which by custom grew out of the estate, and, as a general proposition, where the widow's claim was strictly in the nature of dower ejectment would not lie before assignment.

This doctrine, together with other common-law rules, became a part of the unwritten law of the United States, and, except as it may have been modified or abrogated by special statutory enactment, still governs this branch of our subject. At a comparatively early day, however, we may discern encroachments on the common-law rule by the enactment of statutes conferring a right of action upon the widow prior to admeasurement, by which ejectment virtually became an action for the assignment of dower, and at present laws of this kind are in force in a number of states. In every instance the right to recover dower by ejectment rests entirely upon statute,⁶⁵ and is strictly personal to the widow. Hence, one purchasing such right of dower before admeasurement would be precluded from bringing ejectment either in his own name or in that of his grantor.⁶⁶

The innovation of permitting a widow to sue for dower in this form of action seems to have originated in New York, when the old forms of real actions, including the writ of dower, were abolished. The right to recover after admeasurement remained as theretofore, but if ejectment was brought before such admeasurement, then, instead of the issuance of a writ of possession, upon the filing of the record of judgment, the court appointed commissioners to admeasure and assign the widow's dower and upon the confirmation of their report a writ of possession issued as in other cases. This method does not seem to

⁶⁵ See *Proctor v. Bigelow*, 38 Mich. 282; *Burrall v. Bender*, 61 Mich. 622. ⁶⁶ *Galbraith v. Fleming*, 60 Mich. 413.

have been very generally followed in other states and the usual practice seems to be to have dower assigned in a special proceeding instituted for that purpose, after which, if possession of the assigned lands is withheld, ejectment will lie to recover same.

§ 54. **When right of entry is lost.**—The old books furnish a number of instances whereby the right of entry upon lands may be tolled, that is, taken away or destroyed, and modern writers frequently reproduce these ancient methods when treating of the action of ejectment. But, beyond the exhibition of a little pedantic learning, it is difficult to perceive what useful purpose is served by a recital of these obsolete formulas. The principal ways in which the right was barred were, by discontinuance, by descent, and by limitation. The first has reference to estates-tail and other interests in land which are wholly unknown to our law; the second to emergencies that cannot arise under our system of descents and land titles; the third, which is still effective, will be considered in the succeeding paragraphs.

§ 55. **Statutes of Limitation.**—The law favors the repose and security of titles, and it is competent for the legislature to pass laws limiting the time in which actions may be brought to recover the possession of land or to determine conflicting claims of title. The same power which permits the enactment of laws fixing the periods within which actions must be brought also permits amendments to such laws, changing and abridging the periods, and the change may operate on existing rights. But no amendments can operate to remove a bar that has already become complete,⁶⁷ nor injuriously affect existing claims or rights then vested.⁶⁸ They may have a retroactive effect in some cases, but to secure this they must provide a definite time within which all suits, where the right of action has accrued prior to the passage of the act, must be brought,⁶⁹ and the time so limited must be reasonable.⁷⁰

⁶⁷ *Horbach v. Miller*, 4 Neb. 31; *Thompson v. Read*, 41 Iowa, 48; *Dyer v. Gill*, 32 Ark. 410; *Pearsall v. Kenan*, 79 N. C. 472.

⁶⁸ *Stambaugh v. Snoblin*, 32 Mich. 296.

⁶⁹ *Ludwig v. Stewart*, 32 Mich. 27.

⁷⁰ *Horbach v. Miller*, 4 Neb. 31.

A statute of limitations pertains to the remedy, not to the right of action or validity of the cause of action,⁷¹ but it is the cause of action, and not the form, that determines the applicability of the statute.⁷² The statute does not begin to run in any case until there is a complete and present cause of action.⁷³

§ 56. **Within what time action must be brought.**—The statute of limitations, as now generally enacted, provides in substance that no person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or make such entry first accrued, or within twenty years after he or those from, by, or under whom he claims, have been seized or possessed of the premises, with a saving clause in favor of persons disabled and an exception in favor of the state.

If such right or title first accrued to an ancestor or predecessor of the person who brings the action, the twenty years is computed from the time when such right so first accrued.⁷⁴

It would seem that formerly the right of entry was made to depend largely upon whether the possession of the defendant was adverse to the claim of the plaintiff, and, if it was not, the time of limitation was held not to run. As the question of adverse possession was often one of considerable technical difficulty in its solution, and as the application of the rule was frequently productive of much inconvenience, it was finally abolished in England by statute,⁷⁵ and now the only question is whether the statutory period has elapsed since the right of action accrued, irrespective of the nature of the possession.⁷⁶

§ 57. **When right of action accrues.**—As the statute limits the right of entry or action to a certain period after such right has accrued, it becomes important to ascertain when the right does accrue. In a general way this inquiry is answered in many states by the same statute which prescribes the period during which the right may be exercised. In this particular the

⁷¹ Meek v. Meek, 45 Iowa, 294.

⁷² Callaway v. McMillian, 11 Heisk. (Tenn.) 557; Ganley v. Bank, 98 N. Y. 487.

⁷³ Cairo, etc. R. R. Co. v.

Parks, 32 Ark. 131; Wright v. Tichenor, 104 Ind. 186.

⁷⁴ Beattie v. Whipple, 154 Ill. 273.

⁷⁵ 3 & 4 W. IV, c. 27.

⁷⁶ 2 Arch. Nisi Prius, 317.

law is quite uniform, and the general statutory rules fixing the times at which the right of action begins may be summarized as follows:

First. When any person is disseized, his right of entry or of action shall be deemed to have accrued at the time of such disseizin.

Second. When any person claims as heir or devisee of one who died seized, his right shall be deemed to have accrued at the time of such death, unless there is some other estate intervening after the death of such ancestor or devisor, in which event his right shall be deemed to accrue when such intermediate estate expires, or when it would have expired by its own limitation.

Third. When there is such an intermediate estate, and, generally, in all other cases when a party claims by virtue of a remainder or reversion, his right shall be deemed to accrue when the precedent estate would have expired by its own limitation, notwithstanding any forfeiture thereof for which he might have entered at an earlier time.

Fourth. As a person, when entitled so to do, may enter by reason of a forfeiture or breach of condition, if he claims under such a title his right may be deemed to have accrued when the forfeiture was incurred or the condition was broken.

Fifth. Generally, the right shall be deemed to have accrued when the claimant, or the person under whom he claims, first became entitled to the possession of the lands under the title upon which the action is founded.

§ 58. **Persons under disability.**—Under the English statutes, if at the time at which the right of any person to make an entry or bring an action to recover land shall have first accrued such person shall have been under the disability of infancy, coverture, idiocy, lunacy, or absence beyond seas, then such person, or the person claiming through him, was allowed a further period of ten years from the time of the removal of such disability or the death of the disabled person, in which to assert a right of entry, and this, notwithstanding the full period of twenty years as provided by the statute had expired.¹⁷

¹⁷ 2 Arch. Nisi Prius, 328.

The American statutes have preserved the spirit of the English law in this respect but have greatly abridged the time allowed for the commencement of real actions as well as the classes of persons who may claim the benefits of extension of such time. Coverture is no longer a shield in those states which have enlarged the contractual rights and obligations of married women.⁷⁸ Absence beyond seas was at one time generally recognized as a disability, the term "beyond seas" being taken to mean out of the state or the United States,⁷⁹ but at present the doctrine is practically obsolete although a saving clause may yet be found in some of the statutes with respect to the rights of persons who are absent in the public service. Imprisonment has always been regarded as a disability in a majority of the states, but generally the imprisonment must be upon a criminal charge, or under a sentence for a less period than the term of life.

The trend of the modern statutes may be summarized as follows: If at any time when a right of entry or of action first accrues, the person entitled to make such entry or bring said action is under the age of legal competency, or insane, imprisoned, or absent from the country in the service of the United States or of the state, such person, or any one claiming by, through, or under him, will be allowed a short period, varying from two to five years, after such disability has been removed within which to bring action, notwithstanding the time before limited in that behalf has expired.

It would seem that at one time an attempt was made in England to distinguish between cases of voluntary and involuntary disability. Thus, if insanity occurred after the statute had commenced to run, this would suspend its progress. But this was overruled, upon the principle that a different construction had always been given to all the statutes of limitation and that such nice distinctions would be productive of mischief.⁸⁰ There are some traces of this doctrine in the early decisions of several of the states,⁸¹ as, where a right of action accrued to one labor-

⁷⁸ *Castner v. Walrod*, 83 Ill. 171.

⁷⁹ *Murray v. Baker*, 3 Wheat. (U. S.) 541; *Whitney v. Goddard*, 20 Pick. (Mass.) 304.

⁸⁰ *Adams, Eject.* 59.

⁸¹ See *Machir v. May*, 4 Bibb (Ky.), 44; *May's Heirs v. Bennet*, 4 Litt. (Ky.) 314; *Eaton v. Sanford*, 2 Day (Conn.), 523.

ing under no disability and by his death descended to his heir, who was under some disability, the right of the latter would be saved until the full expiration of the statutory period after such disability had been removed. But, as a general proposition, the doctrine never received a recognition in the United States and has been repudiated in states where it seems to have been announced. The uniform rule now is that when the statute of limitations has once commenced to run no subsequent disability can check or interrupt it.⁸²

§ 59. **Heirs and successors of person under disability.**—The general statutory provision with respect to heirs and successors to the title of disabled persons is, that, if the person first entitled to make entry or bring action dies during the continuance of any of the disabilities mentioned in the statute, and no determination or judgment has been had of or upon the title, the action may be brought by the heirs of such person or by any one claiming under or by him, at any time within two years after his death, notwithstanding that the time previously limited in that behalf has expired.

But this is the full measure of protection afforded. If the statute begins to run during the lifetime of an ancestor, his death, and the descent to his heirs of his rights in land, will not interrupt the continuance of the statute nor the completion of its bar,⁸³ and it is immaterial whether or not the heirs are under disability.⁸⁴

§ 60. **Prevention of suit by paramount authority.**—Whenever a person is prevented from exercising a right or from resorting to a legal remedy for its vindication, by some paramount authority, the time during which he is thus prevented is not to be counted against him in determining whether the statute of limitation has barred his right.⁸⁵ This is true even though the statute makes no specific exception in his favor in

⁸² *Kistler v. Hereth*, 75 Ind. 177; *Piper v. Hoard*, 107 N. Y. 67; *Castro v. Gell*, 110 Cal. 292; *Lincoln v. Norton*, 36 Vt. 679; *Daniel v. Day*, 51 Ala. 431.

⁸³ *Reedy v. Millizen*, 155 Ill. 636; *Rogers v. Brown*, 61 Mo. 187; *Henry v. Carson*, 59 Pa. St.

297. But see *Ladd v. Jackson*, 43 Ga. 288.

⁸⁴ *Oates v. Beckworth*, 112 Ala. 356; *White v. Clawson*, 79 Ind. 192.

⁸⁵ *St. Paul, etc. Ry. Co. v. Olson*, 87 Minn. 117, 94 Am. St. 693, 91 N. W. Rep. 294; *Kelly v. Donlin*, 70 Ill. 378.

such cases.⁸⁶ This is well illustrated in a case where while one person claims public land under a grant, another goes into possession thereof, and after denial of his application to enter it as a homestead keeps the matter in litigation by successive appeals in the land department of the United States for a long period. As the courts have no right to invade the functions confided by law to other departments of the government, or interfere in matters exclusively intrusted to their determination, so long as such matters are pending and undetermined, it follows that the claimant would be unable to maintain an action of ejectment in the state courts during the time the appeals were pending and therefore such time should not be counted against him when he finally brings his action.⁸⁷

So, also, if the owner of the paramount title is enjoined, at the suit of one in possession, from setting up or insisting upon any title or interest in the land, such injunction will afford sufficient ground for not allowing the running of the statute to ripen into a bar of the owner's right, during the time the injunction was in force.⁸⁸

§ 61. Lands sold for taxes.—By statute, in a number of states, a special limitation is fixed for the recovery of land sold for taxes. This limitation is generally placed at from two to five years after the date of sale or issuance of tax deed, the rule varying somewhat in this respect, and unless action shall be brought within such period the original title is extinguished and all rights thereunder barred, except that a further time for redemption is allowed in the case of minors, lunatics, or persons otherwise under legal disability. The effect of such laws is to create a new and shorter period of limitation of the right of entry upon land, and, for this reason, the wisdom as well as expediency of legislation of this character may well be doubted. But where the laws creating this new term have been tested they have generally been upheld.⁸⁹ It is contended, in support of such laws, that they are neither harsh nor oppressive; that they

⁸⁶ *Braun v. Sauerwein*, 10 Wall. (U. S.) 218.

⁸⁷ *St. Paul, etc. Ry. Co. v. Olson*, 87 Minn. 117.

⁸⁸ *Kelly v. Donlin*, 70 Ill. 378.

⁸⁹ See *Russell v. Lumber Co.*, 45 Minn. 376; *Crisman v. Johnson*, 28 Colo. 264; *Russell v. Lang*, 50 La. Ann. 36.

contravene no constitutional rights, and that they are necessary to secure the collection of the public revenue; that considerable time must elapse between assessment and sale; that where the limitation commences to run from the issuance of the tax deed a still further time is allowed while the certificate is maturing, and that during the limitation period then ensuing the owner has ample time and opportunity to question the invalidity of the tax proceeding if so disposed. Further, that if he fails to move during all these years it is but reasonable that he should not thereafter be heard to complain.⁹⁰

But this shortened period of limitation does not always apply only to original owners. In some cases the tax purchaser is under the necessity of asserting his rights against the original owner in possession within the same limited period, and in the extent of his failure so to do his remedy is barred.⁹¹ Usually however, a tax deed is not distinguished from other muniments of title, and where a limitation is created it applies to the time within which a deed must be applied for and not to rights that may be asserted under a deed actually issued. This matter is statutory. The general rule is that application for deed must be made within, say two years from the time the certificate of sale is issued.

⁹⁰ *Crisman v. Johnson*, 23 Colo. 264.

⁹¹ *Coale v. Campbell*, 58 Kan. 480, 49 Pac. Rep. 604.

CHAPTER IV.

NOTICE TO QUIT.

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| <p>§ 62. Generally considered.
63. When notice is required.
64. When notice is dispensed with.
65. When notice is not required.
66. Tenant from year to year.
67. Continued — Theory of tenancy.</p> | <p>§ 68. Tenant holding over.
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70. Tenant by sufferance.
71. Vendees.
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§ 62. Generally considered.—When a person has acquired possession of the lands of another, which he continues to retain, a question arises as to the right of the owner to institute proceedings to dispossess such occupant before a notice to quit has been given to him or a demand for such possession has been made. The strong tendency of modern decisions is to require such notice, where the entry was peaceable and with the consent of the owner. The theory in such cases proceeds on the lines of tenancy, or a holding of some kind in subserviency to the rights of the owner, and while the theory becomes considerably attenuated at times it is always consistent with this notion. Where the owner does any act from which a tenancy of any kind may fairly be inferred courts are ever inclined to extend the benefit of same to the occupant, and, generally, where the holding is not for any fixed or determinate time, and it is only by construction that a limitation can be applied to it, a manifestation of intention is required before the tenant can be called upon to surrender possession to the owner of the reversion.

The reason for a notice seems to grow out of the essential character of the action; that is, that an ejectment can only be brought for an unlawful or tortious detention.⁹² When posses-

⁹² It has been noted by several writers as a singular fact that we are unable to find in the old authorities any decisions rela-

tive to notices to quit, notwithstanding the practice of giving them is very ancient, and it was not until the latter half of the

sion of land has been acquired by the consent of the owner, or where there has been a long and continuous holding under circumstances which indicate an acquiescence on the part of the owner, such possession must generally be regarded as rightful and will not, as a rule, be deemed wrongful until a demand for possession has been made.⁹³ A refusal to surrender, or a non-compliance with the demand, furnishes the gist of an action for the recovery of the land,⁹⁴ and the occupant may then be regarded as a wrongdoer. On the other hand, if the entry was wrongful in its inception, or has become so afterward, no demand is necessary, the possession being already tortious.⁹⁵

As a deduction from the foregoing we may frame the following conclusion. A notice to quit, or a demand for possession—which in law, so far as the action of ejectment is concerned, means the same thing—is never required unless there is some privity between the parties to the suit with respect to the premises sought to be recovered, and where the parties respectively claim under hostile titles the doctrine of notice to quit or demand of possession has no application. The different phases of the subject will form the substance of the succeeding paragraphs of this chapter.

§ 63. **When notice is required.**—It would seem to have been the rule as early as the reign of Henry VIII, that, in any holding on which an annual rent was reserved, the tenant was entitled to a half year's notice to quit in the event of the landlord's election to terminate the tenancy. Modern legislation has changed and reduced the duration of the time of the notice in many instances, but the principle has been retained intact, and the general rule now is that, whenever the reservation of rent or other circumstance, indicates an agreement for an annual holding, or, as it is generally termed, a tenancy from year

eighteen century that they commenced to secure the attention of the courts. While the doctrine of notices is now well established and clearly defined, it is yet of comparatively modern origin.

⁹³ *Kirkland v. Trott*, 66 Ala.

417; *Chicago, etc. R. R. Co. v. Knox College*, 34 Ill. 195.

⁹⁴ *Holston v. Needles*, 115 Ill. 461; *McCarthy v. Brown*, 113 Cal. 15.

⁹⁵ *Springs v. Schenck*, 99 N. C. 551; *Herrell v. Sizeland*, 81 Ill. 457; *Livingstone v. Tanner*, 14 N. Y. 64.

to year, such tenant cannot be ejected from the land which forms the subject matter of the tenancy, without a notice to quit.⁹⁶ In like manner, if the tenancy is from month to month, it entitles the tenant to notice before he can be sued for possession,⁹⁷ and generally, whenever the tenant enters into possession with the assent of the landlord, and no definite period is fixed for the determination of such possession, a notice to quit will be necessary before the landlord can bring ejectment,⁹⁸ unless some act or event has occurred which, of itself, terminates the holding.⁹⁹ Where a tenant in possession dies his interest in the land vests in his personal representative who will continue to hold on the same terms as the original tenant, and be entitled to the same notice to quit.¹ These rules were formulated at a comparatively early period in the history of the action in this country and have received a general acceptance in all of the states with but little change or deviation.

§ 64. **When notice is dispensed with.**—Although a tenant may be entitled to notice to quit, yet the necessity for such notice may be superseded and the tenancy terminated by his denial, either by word or act, of the title of the landlord.² Thus, where a defendant in ejectment repudiates a tenancy and claims title in fee,³ or where he attorns to a stranger,⁴ he thereby dispenses with the necessity of a notice, for by such acts he puts himself broadly in hostility to the right of the landlord, who will not then be required to prove that the term has ended nor

⁹⁶ Jackson v. Miller, 7 Cow. (N. Y.) 747; Scully v. Murray, 84 Mo. 420; Leavitt v. Leavitt, 47 N. H. 329; Hunt v. Morton, 18 Ill. 75; Coomler v. Hefner, 86 Ind. 110.

⁹⁷ Warner v. Hale, 65 Ill. 395; Seem v. McLees, 24 Ill. 193; Prindle v. Anderson, 19 Wend. (N. Y.) 391.

⁹⁸ Jackson v. Miller, 7 Cow. (N. Y.) 747; Coomler v. Hefner, 86 Ind. 110.

⁹⁹ Jackson v. Miller, 7 Cow. (N. Y.) 747; Clark v. Rhoads, 79 Ind. 344.

¹ Cody v. Quarterman, 12 Ga. 386.

² Wood v. Morton, 11 Ill. 517; Jackson v. Wheeler, 6 Johns. (N. Y.) 272; Catlin v. Washburn, 3 Vt. 25; Vincent v. Corbin, 85 N. C. 108; McCarthy v. Brown, 113 Cal. 15; Sims v. Cooper, 106 Ind. 88.

³ Herrell v. Sizeland, 81 Ill. 457; Eberwine v. Cook, 74 Ind. 378.

⁴ Woodward v. Brown, 13 Pet. (U. S.) 1.

that he has made a demand for possession.⁵ So, too, if a tenant for years, during the term, conveys the demised land to another in fee, he thereby disclaims the tenancy and the landlord may at once proceed to repossess himself without notice to quit,⁶ and generally, where this view of the law prevails, whenever the relation of landlord and tenant is terminated by any hostile act, it becomes the bounden duty of the landlord to protect his title by regaining possession.⁷

In the instances above given we can readily understand why the landlord should not be required to give notice before instituting an action of ejectment, as the tenant disclaims holding as such. But cases will arise where the question is not so clear. Thus, a tenant may refuse to pay rent to one claiming as heir, where the ancestors estate has not been probated, or to one claiming as devisee, where the will is being contested. At the same time he may declare his willingness to pay rent to any person who may show himself lawfully entitled to receive it. In England the authorities leave the matter in doubt and no American decisions bearing directly upon the point have been brought to the writer's attention. The tendency of the English decisions seems to be that such statements would not constitute such a disavowal as to dispense with a notice to quit.⁸

§ 65. When notice is not required.—It is a rule of general and uniform observance that where the defendant in ejectment has not entered into possession under the plaintiff or by his consent, so that there is no relation of landlord and tenant, nor any privity between them, but each claims adversely to the other, no demand of possession or notice to quit is necessary before action brought.⁹ This rule applies in all cases where the defendant denies plaintiff's title and right of possession and sets up a distinct claim of ownership in himself or another.¹⁰

⁵ *Springs v. Schenck*, 99 N. C. 351; *McGinnis v. Fernandes*, 126 Ill. 230; *Sims v. Cooper*, 106 Ind. 88.

⁶ *Trustees v. Jennings*, 40 S. C. 168, 42 Am. St. 854.

⁷ *Trustees v. Meetze*, 4 Rich. (S. C.) 50; *Schoonmaker v. Doolittle*, 118 Ill. 607.

⁸ See *Doe v. Pasquall*, Peake (Eng.), 196.

⁹ *Schoonmaker v. Doolittle*, 118 Ill. 605.

¹⁰ *Harland v. Eastman*, 119 Ill. 22; *McCarthy v. Brown*, 113 Cal. 15.

But even where an entry has been made under the plaintiff and by his consent, so that a relation of tenancy is created, it does not follow that a demand for possession is necessary before an action for eviction. In many cases subsequent events may so fix the rights of the parties that no demand is necessary. Thus, where a tenancy is for a fixed term, as where a lease is made determinable on a certain event or at a particular period, and the term expires by its own limitation, the authorities are unanimous in declaring that no notice to quit is necessary, as both parties, in contemplation of law, are equally apprised of the end of the term. In such case the lease is itself an all-sufficient notice,¹¹ and the tenant is bound to surrender possession at its expiration.¹² Nor does the mere fact that the tenant remains in possession after the expiration of his lease, without the consent of his landlord, change his holding into a tenancy at will or any other form of estate which requires notice to terminate.¹³ Thus, where a tenant holds for the life of another, who dies, the tenant, by remaining in possession after the death of the *cestui que vie* without the consent of the owner of the reversion, thereby becomes a trespasser and no notice will be required before bringing ejectment.

§ 66. **Tenant from year to year.**—There is a recognized distinction between tenancy for years, which is a letting for a specific term, and tenancy from year to year, which combines many of the features of tenancy at will. As a general proposition a lease for no determinate period of time, but by which an annual rent is reserved, is a lease from year to year so long as both parties may desire. It is binding for one year only but is capable of being extended for a second or any succeeding number of years, and will so continue unless determined by the dissent of either party. This termination may be accomplished by notice before the close of the year. Hence, if the tenant continues to hold the demised premises until the com-

¹¹ *Canning v. Fibush*, 77 Cal. 196; *Livingston v. Tanner*, 14 N. Y. 64; *Alcorn v. Morgan*, 77 Ind. 186.

¹² *Secor v. Prestana*, 37 Ill. 525; *Kuhn v. Smith*, 125 Cal. 615, 73 Am. St. 79; *Gladwell v. Hol-*

comb, 60 Ohio St. 427, 71 Am. St. 724; *Torrey v. Torrey*, 14 N. Y. 430; *McClure v. McClure*, 74 Ind. 110.

¹³ *Kuhn v. Smith*, 125 Cal. 615; *Livingston v. Tanner*, 14 N. Y. 64.

ment of a second year, without offering to surrender or receiving a notice to quit, he will be entitled to hold for another year despite the landlord.¹⁴

To determine an estate from year to year at common law, six months' notice was required before the end of the year of tenancy, and this rule has found statutory confirmation in many of the states. Usually, however, a shorter period is prescribed, varying from two to three months.¹⁵ It would seem that formerly such notice might be verbal, that is, by word of mouth, but, as a rule, the notification must now be in writing, and given at the time and in the form prescribed by statute.¹⁶

§ 67. Continued—Theory of the tenancy.—It is believed that the foregoing expresses not only the general doctrine of the common law but also the statutory policy of a majority of the states. It will be remembered that the doctrine of the common law grew out of the principle, that where land is let for an uncertain time a termination of the tenancy by act of the landlord, or indeed from any cause other than the default of the tenant, entitles the latter to emblements. Through the operation of this principle tenancies at will were early construed by the English courts into tenancies from year to year, and, that the tenant might be secured in his emblements, that is, that he might be enabled to reap the crops which he had sown, six months notice was required before he could be compelled to surrender possession. In its origin the rule applied to agricultural tenancies only, but, in course of time, it became extended to all holdings of a similar nature without respect to the character of the land.

The early views seem to contemplate a presumed intention of the parties that the tenancy should be prolonged for an indefinite number of years, and hence, being of such uncertain duration, it was deemed just that either party should have reasonable notice, before the expiration of the year, of the others

¹⁴ Johnson v. Johnson, 13 R. I. 467; Bacon v. Brown, 9 Conn. 334; Rich v. Bolton, 46 Vt. 84; Dunne v. Trustees, 39 Ill. 578; Ridgeley v. Stillwell, 25 Mo. 570; Rothschild v. Williamson, 83 Ind. 387.

¹⁵ This matter is statutory. Consult local statutes.

¹⁶ See Williams v. Deriar, 31 Mo. 18; Hanchet v. Whitney, 1 Vt. 311; Epstein v. Greer, 78 Ind. 349.

intention to end it, and this view, in large measure, has been retained in those states where the rule of notice still obtains.

§ 68. *Tenant holding over.*—The exigencies of modern land tenures have to some extent modified the application of the old rules, and it is contended that a distinction should be made between those tenancies from year to year which originally were of uncertain duration and those which arise where a tenant holds over after the expiration of a lease for a specified term. In each year of occupancy under the former, there is, it is said, a growing interest in the ensuing year springing out of the original contract, while in the latter case a new contract arises each year of the holding over, by implication from the conduct of the parties.¹⁷

Where this view obtains it would seem that in case of a specific letting for a year, the tenant holding over is regarded as consenting or proposing to enter upon a new term for another year at the same rent and upon the same conditions of the prior occupancy, and the landlord's acceptance of the proposed tenancy is presumed from his receiving rent or other acts of acquiescence. But, while by remaining in possession without any new arrangement the tenant is regarded as offering to take the premises for another year, upon the terms of the tenancy which has just expired, yet the landlord is under no obligation to accept the offer, and, unless he does so, by receiving rent or by some other unequivocal act of assent, the tenancy is terminated and no notice is necessary.¹⁸

The principle involved in the foregoing has been extended in some states to a continuous holding after the expiration of the original term, a new contract embodying the conditions of the original term being held to be created each successive year, and, in those states, if at the end of any year the tenant continues in possession without the landlord's consent, this will be equivalent to holding over after the expiration of a lease for a specific term. In such event the landlord is at liberty to treat

¹⁷ See *Alexander v. Harris*, 4 Ferry Co., 82 Ill. 230; *Smith v. Cranch* (U. S.), 299; *Baltimore, etc. R. R. Co. v. West*, 57 Ohio St. 161.

¹⁸ *Cairo, etc. Co. v. Wiggins*

Ferry Co., 82 Ill. 230; *Smith v. Littlefield*, 51 N. Y. 539; *Kuhn v. Smith*, 125 Cal. 615; *Gladwell v. Holcomb*, 60 Ohio St. 427.

the occupant as a trespasser and may maintain ejectment against him without any previous notice of his intention not to prolong the tenancy.¹⁹

§ 69. *Tenant at Will*.—It would seem that at common law a tenant at will was not entitled to a formal notice to quit and anything which amounted to a demand of possession was sufficient to determine the will and put an end to the tenancy.²⁰ This doctrine, however, was never uniformly accepted in this country and much diversity of opinion is expressed in the earlier decisions. The general proposition, that no one who holds lands by another's consent for an indefinite period should ever be evicted by ejectment at the suit of such party without previous notice to quit, soon found support,²¹ and a general tendency was manifested to regard a tenant at will in much the same light as a tenant from year to year so far as concerned his right to notice.

The statute, however, in many instances, has come in to supply the deficiencies of the common law and to settle conflicting theories with respect to notice. In most cases the estate at will is terminable upon thirty days' notice, although in some states a longer period is provided. In some states the common-law rule still obtains and the tenancy may still be terminated, without a formal notice to quit, by a simple demand of possession.²² As previously shown, however, a tenant for years, or anyone who is in possession under a lease for a definite period, is under a duty to vacate upon the expiration of the term without notice. If the tenant remains in possession after such expiration without the lessor's consent, he does not become a tenant at will nor is he entitled to notice.²³

§ 70. *Tenant by sufferance*.—A tenancy by sufferance is, for all practical purposes, a trespass. It arises by operation of law and not from contract or agreement of the parties, and is,

¹⁹ *Gladwell v. Holcomb*, 60 Ohio St. 427; *McKissick v. Ashby*, 98 Cal. 425.
²⁰ *Chamberlin v. Donohue*, 45 Vt. 50; *Withers v. Larrabee*, 48 Me. 570; *Herrell v. Sizeland*, 81 Ill. 457; *Johnson v. Johnson*, 13 R. I. 467.

²¹ See *Jackson v. Laughhead*, 2 Johns. (N. Y.) 75.

²² See *Herrell v. Sizeland*, 81 Ill. 457. But compare *Chicago, etc. Ry. Co. v. Knox College*, 34 Ill. 195.

²³ *Kuhn v. Smith*, 125 Cal. 615; *Alcorn v. Morgan*, 77 Ind. 186.

at best, but a fictitious expedient to save the rights of those lawfully entitled to enter and to prevent the institution of an adverse holding or possession. There is no privity between the tenant and the landlord,²⁴ and no relation further than to raise the ordinary estoppel of a tenant to deny his landlord's title.²⁵

At common law such a tenant is not entitled to notice to quit nor is any demand of possession necessary before the institution of suit.²⁶ It has been held that an entry should be made to terminate the tenancy,²⁷ but it seems that almost any kind of entry will suffice for this purpose, nor is it necessary that same should be made in a peaceable manner.²⁸ The party having the right to enter may either declare his purpose to regain possession or he may do any act indicative of such intent.

The desire to remove apparent hardships, as well as a misconception of the character of a tenancy by sufferance, has induced legislatures of a number of the states to mitigate the severity of the common-law rule with respect to notice. In these states a right to notice is conferred by statute, the periods ranging from one to three months. The justice of the innovation is open to question, notwithstanding it was undoubtedly prompted by humanitarian motives, while the practical legal effect is to convert the tenancy from one by sufferance to one at will. The courts, in construing such statutes, have ever been inclined to draw the lines strictly, and, while it is difficult to reconcile some of the decisions with the language of the statute, to confine the right to notice to such tenancies only as imply an assent on the part of the landlord.²⁹ Where this is made to

²⁴ *Bennett v. Robinson*, 27 Mich. 32; *Livingston v. Tanner*, 14 N. Y. 64.

²⁵ *Griffin v. Sheffield*, 38 Miss. 359; *Jackson v. McLeod*, 12 Johns. (N. Y.) 182.

²⁶ *Rich v. Keyser*, 54 Pa. St. 86; *Russell v. Fabyan*, 34 N. H. 218; *Howard v. Carpenter*, 22 Md. 10; *Livingston v. Tanner*, 14 N. Y. 64; *Jackson v. McLeod*, 12 Johns. (N. Y.) 182.

²⁷ *Rising v. Stannard*, 17 Mass. 282.

²⁸ *Donnell v. Johnson*, 17 Pick. (Mass.) 266.

²⁹ Thus, a tenant holding over after the expiration of a definite term, without permission, is strictly a tenant by sufferance, yet it has been held that no notice is necessary in such case before proceeding by ejectment, notwithstanding the statute provides for a notice in case of a tenancy at will or by sufferance. Such notice, it is said, is necessary only in case there is such a

appear the statute applies to all cases of tenancy by sufferance, however created. As a rule, however, the statute has not changed the character of a holding over from a trespass to a tenancy, and if the holding is wholly without the consent of the person next entitled to the possession, then the requirements of the statute relative to the prerequisites for bringing an action of ejectment do not apply, and a recovery may be had of the lands so held without any previous notice.

§ 71. *Vendees*.—As a general rule a notice to quit is never necessary unless the relation of landlord and tenant exists; and for this reason it has been repeatedly held that where a vendee enters under a contract of purchase, although with the consent of the vendor, the latter may maintain ejectment against him without a previous notice to quit.³⁰ But though the rule is very positively asserted in the earlier cases, yet an examination of the facts involved generally shows that it was applied only where the vendee who had thus entered had failed to perform his part of the contract under which he entered, and where the vendor had taken some steps to show that the contract was at an end; and while the principle has never been overruled and still controls as a settled proposition of law, it is nevertheless modified by the further doctrine that it is only to be applied when the right to retain possession has been in some manner forfeited by the purchaser. Hence, if the purchaser repudiates the contract under which he obtained possession, or fails to comply with its terms, the vendor is at liberty to treat the contract as rescinded and regain possession of the land by an action of ejectment; and in such case neither a demand of the possession nor a notice to quit is necessary.³¹

tenancy at will or by sufferance as needs to be terminated, and that such a tenancy is not created, within the meaning of the statute, by a tenant holding over his term; to entitle the tenant to notice, the holding over must be continued for such length of time after the expiration of the term and under such circumstances as to authorize the implication of assent on the part

of the landlord to such continuance. *Smith v. Littlefield*, 51 N. Y. 539.

³⁰ *Jackson v. Miller*, 7 Cow. (N. Y.) 751; *Jackson v. Moncrief*, 5 Wend. (N. Y.) 26.

³¹ *Prentice v. Wilson*, 14 Ill. 91; *Wright v. Moore*, 21 Wend. (N. Y.) 230; *Hotelling v. Hotelling*, 47 Barb. (N. Y.) 163; *Hicks v. Lovell*, 64 Cal. 14.

It would seem, however, that where a party acquires possession of land under an executory contract of purchase, and is not in default, the vendor cannot maintain ejectment against him until he has demanded possession or given him notice to quit. The possession of the purchaser being lawful in its inception does not become wrongful until he is called upon to restore it.³² This proceeds upon the theory that no man who holds lands of another by such other's consent should ever be evicted without notice,³³ and as the relation of the vendee more nearly resembles that of a tenant at will than any other, there is much propriety, as well as manifest justice, in requiring that he should first receive notice before resort is had to more stern and summary measures. But where a vendee has failed to perform the conditions and agreements of the contract under which he entered, notwithstanding his possession was taken by and with the assent of the vendor, it would seem to be the general rule that no other or further notice is necessary than that of a termination of the contract, and that the vendor may maintain ejectment without first having given a notice to quit.

§ 72. **Vendors.**—Where a vendee has fully paid the purchase money and otherwise complied with the conditions of sale, he becomes clothed with an equitable title that in some states will be sufficient to enable him to maintain an action for the possession of the land. The relation of the parties will be discussed in another place and it will be sufficient in this connection to note that where an action for recovery may be brought, no notice to quit will, as a rule, be necessary before instituting the action. A vendor who refuses to deliver the premises to the vendee is regarded much the same as a trespasser. He will not be treated as a tenant at will, in the absence of any agreement between the parties, and hence entitled to a notice in writing before the commencement of suit, but action will lie immediately to recover the lands as in any other case of tortious holding.³⁴

§ 73. **Mortgagors.**—Where the common-law doctrine of mortgages is recognized and ejectment is permitted to be

³² *Prentice v. Wilson*, 14 Ill. 91. *Jackson v. Miller*, 7 Cow. (N. Y.) 747.

³³ *Jackson v. Longhead*, 2 Johns. (N. Y.) 75. ³⁴ *Vance v. Anderson*, 113 Cal. 532. And see

brought on conditional conveyances of this kind; it would seem that after breach of condition the mortgagor becomes liable to immediate eviction at the suit of the mortgagee, and, in such case, no notice to quit or demand for possession is necessary before resorting to the action.³⁵ The principle of this seems to be, not that the mortgagor is tenant at will to the mortgagee after the forfeiture, but that he is then acting as a kind of trustee for him, subject to have his authority concluded at the mortgagee's pleasure. This, at least, is the doctrine to be drawn from the English cases but it is difficult to reconcile the same with the general spirit of American law, even in those states where ejectment is still permitted to lie on a mortgage.

It would seem also that the lessees of the mortgagor are liable to be evicted without notice, provided they have been let into possession subsequent to the mortgage and without the consent of the mortgagee.³⁶ But if a lease has been given by the mortgagor with the assent or concurrence of the mortgagee, or if the mortgagee, with knowledge of the lease, permits or encourages the lessee to expend money or labor upon the premises, it may admit of doubt whether by such conduct the mortgagee has not confirmed the lease so far, at least, as to render a notice to quit necessary before ejectment can be maintained.

With respect to tenancies created prior to the execution of the mortgage the duty of the mortgagee is much the same as that of the mortgagor before the mortgage was made.

A purchaser from a mortgagor stands in no better position than his grantor, and may be evicted without notice.³⁷

§ 74. **Licensees.**—Where a person enters into possession of land with the permission of the owner, as a mere occupant and without the payment of rent, he is entitled to a reasonable notice to quit before an action of ejectment can be maintained against him. This would seem to be the English rule and also that of those states in which the common law has not been repealed. The reason for this is, that a person entering by permission of the owner is not a wrong-doer nor can his possession become tortious until there has first been a demand for

³⁵ Kilgour v. Gockley, 83 Ill. 109; Pierce v. Brown, 24 Vt. 165. ³⁷ Jackson v. Hopkins, 18 Johns. (N. Y.) 487.

³⁶ Jackson v. Hopkins, 18 Johns. (N. Y.) 487.

the surrender of such possession and a refusal. It is immaterial that the owner may have a right to revoke the license and to re-enter upon the land. The entry by the licensee was with the owners consent, and it is unreasonable that he should be subjected to costs until his possession shall have become wrongful.³⁸ In many of the cases in which the rule has been announced the occupant has been treated as a sort of a tenant and the cases, in the main, have proceeded on the grounds of tenancy, but whether the licensee be regarded as a tenant from year to year, or at will, or even as a mere occupant, the right to reasonable notice turns on the fact that he is in possession with the owners consent. Such being the case his occupancy is rightful and he must have a reasonable time within which to surrender possession. What is a reasonable time, in the absence of positive statute, must depend on the character of the possession. In case of agricultural lands the element of emblements would probably serve to indicate such time. Where the question of emblements is not involved a shorter time might suffice, but, in all cases, it must be reasonable in view of the circumstances.³⁹

If the occupant entered with right but his subsequent possession became wrongful, as where he denies the title of the licensor, or disclaims holding under him, no notice would be necessary. If the licensee refuses to surrender within a reasonable time after demand of possession, the action lies as in other cases and the owner may recover the land from him.⁴⁰

³⁸ Jackson v. Wheeler, 6 Johns. (N. Y.) 272; Chicago, etc. R. R. Co. v. Knox College, 34 Ill. 195.

³⁹ Jackson v. Livingston, 1 Johns. (N. Y.) 322.

⁴⁰ Chicago, etc. R. R. Co. v. Knox College, 34 Ill. 195.

CHAPTER V.

INCIDENTAL MATTERS OF PRACTICE.

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| <p>§ 75. Introductory.
76. Form of the action.
77. Joinder of actions.
78. Concurrent actions.
79. Process and appearance.
80. Continued—Former practice.
81. Continued—Present practice.
82. Service.</p> | <p>§ 83. Continued—Agents.
84. Owner out of possession.
85. Attorney's authority to bring suit.
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87. Precept to stay waste.
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89. Enjoining ejectment suit.</p> |
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§ 75. **Introductory.**—It is proposed, in this chapter, to discuss briefly such incidental matters of practice as do not properly fall under other heads, or which, by reason of their nature, are not susceptible of a more systematic classification. In the chapters which follow an orderly presentation will be made of the general features of practice in the action as they severally associate themselves with the ideas involved in the parties, pleading, proof, judgment and execution.

§ 76. **Form of the action.**—At the present time ejectment does not differ in essential characteristics from other actions at law. It is commenced by summons, which shall be in like form as other summons at law. The use of fictitious names of plaintiffs or defendants, and of the names of any other than the real claimants, and the statements of any lease or demise to the plaintiff, and of an eviction by a casual or nominal ejector, are abolished. As a necessary result of the foregoing, the consent rule formerly employed is also dispensed with. The pleadings are filed at the same time and in the same manner as other actions and the rules of pleading and practice in legal actions generally will govern in all actions of ejectment so far as they are applicable. The issue is made naturally, either by general denial or special plea, and the cause proceeds to trial on the question thus raised. Special provision is made for certain contingencies and for the few features which are peculiar to the relief sought, but the general form of the action is not dis-

tinguishable from the ordinary action *in personam*. The nature of the recovery necessarily influences the form of the verdict, and it is in this particular that we find the greatest divergence from the usual form of legal actions. There is nothing complicated in the procedure, however, and for directness and simplicity it is not excelled by any other species of legal remedy.

§ 77. **Joinder of actions.**—It was permissible at common law, where several causes of action of the same nature existed between the same parties, to join them in one action by several counts in the declaration. This procedure was retained by the courts of the colonies and afterward adopted by the states, and still continues to be followed in those states which employ the common law practice. In states using the so-called codes the principle has not only been retained but greatly extended, and in such states it is allowable, in many instances, to join causes of action not of the same nature where they grow out of the same transaction. But this privilege, at common law, did not extend to actions of ejectment, and even under the present liberal practice in England, whereby causes of action of any kind, provided they are by and against the same parties and in the same rights, may be joined in the same suit, *replevin* and *ejectment* are expressly excepted.

While the joinder of actions often depends on the form of the action rather than the subject-matter or cause of action, yet the nature of the cause of action is the best test by which to determine questions of this kind, and unless the same plea may be interposed and the same judgment given on all of the counts of the declaration, or, at all events, unless the same judgment can be given although the pleas may be different, several causes of action cannot be joined.⁴¹ When we shall apply this test to the action of *ejectment* as formerly administered the impossibility of joining any other action with it is apparent, and even in modern practice, under the theories by which the action is supported, a joinder of another cause of action, distinct in its nature and calling for a different judgment, is a matter of very doubtful propriety. In a number of states such joinders are now permitted, but where this is not allowed the consequences

⁴¹ See 1 Chit. Pl. 199; Tidd, Prac. 12; Com. Dig., Action G.

of a misjoinder remains as at common law and the declaration will be bad on demurrer or in arrest of judgment.⁴² The special features of this subject, and the counts that may be inserted in a declaration in ejectment, will be shown in the chapter devoted to the pleadings in the action.

§ 78. **Concurrent actions.**—Generally, where two suits are commenced for the same cause of action, and which involve the same question, a plea in abatement will be sustained in the second suit, but in order to secure this effect it must appear that the two suits are identical. It is not enough that the same land is in controversy.⁴³ Hence, it has been held that a plaintiff may have two suits against the same defendant for the recovery of the same land pending at the same time, if the second is brought upon a title acquired after the commencement of the first.⁴⁴

§ 79. **Process and appearance.**—Under the old practice, in civil cases generally, after the original writ had been sued out, the means whereby a defendant was compelled to appear in court was called *process*, or sometimes, to distinguish it from intermediate measures, *original process*. In modern practice the first process in an action is a summons, except in actions where special bail may be required. This process, as a general proposition, is issued under the seal of a court, tested in the name of the clerk of such court, and directed to the sheriff of the county for service on the defendant.⁴⁵ A hasty glance at past and present methods may not be un instructive.

§ 80. **Continued.—Former Practice.**—Under the old form of the action of ejectment the declaration was, in effect, a kind of process to bring the interested party into court. The suit was commenced not in the usual manner, by suing out a writ, but by a delivery of the declaration to the tenant in possession.

⁴² *Guinnip v. Carter*, 58 Ill. 296; *Williams v. Bradbury*, 9 Tex. 487; *Pell v. Levett*, 19 Wend. (N. Y.) 546. This is the doctrine stated by Chitty and other writers on common-law pleadings. See 1 Chit. Pl. 205.

⁴³ *Mandeville v. Avery*, 124 N. Y. 376.

⁴⁴ *Leonard v. Flynn*, 89 Cal. 535.

⁴⁵ The codes make some changes in this rule by permitting process to issue without seal at the instance of the plaintiff. The process is directed to the defendant personally and may be served by any one.

This was occasioned by the fact that the plaintiff and defendant were fictitious persons, and hence, the suing out of a writ would be but a useless form. The declaration then, being the only means by which the party in possession was informed of the claim set up by the lessor and the only warning given of his proceedings, its delivery bore a close resemblance to the service of a writ and was governed by much the same rules as process generally.

Accordingly the suit was commenced by the delivery of the declaration against the casual ejector to the tenant or person in possession, and this was considered as much a commencement of the action as would the service of a summons or *capias* in personal actions.⁴⁶ This was regarded as sufficient to put persons interested on inquiry, and for all practical purposes the declaration was treated as a process of the court.⁴⁷ The service was proved by affidavit of the process server.

§ 81. **Continued—Present practice.**—When the fictions of the action were abolished and the action itself was made to conform to the general plan of other actions at law, whereby the real parties became plaintiff and defendant, the reason of the old practice requiring service of the declaration disappeared. Thereupon the practice itself was discontinued, and at the present time the action is commenced by summons, which is in like form, and is issued, tested, served and returned as other summons at law.

§ 82. **Service.**—Under the ancient practice, which required service of the declaration, it was necessary that the nature and contents of the declaration should be explained at the time to the person to whom it was delivered, and courts would closely scrutinize the method of service to ascertain if a proper delivery had been made.⁴⁸ To be strictly regular the service was required to be made upon the party in possession, and, if the possession was divided, then upon each of the tenants,⁴⁹ but it seems that when personal service could be effected it was im-

⁴⁶ *Baron v. Abeel*, 3 Johns. (N. Y.) 482.

⁴⁷ Thus, the court might punish, as for a contempt, any improper conduct of the tenant at

the time of the declaration was delivered.

⁴⁸ *Jackson v. Stiles*, 1 Cow. (N. Y.) 222.

⁴⁹ *Camden v. Haskill*, 3 Rand. (Va.) 462.

material whether it was made upon the demised premises or elsewhere.⁵⁰

It would frequently happen, however, that either from wilful or accidental absence of the tenant, or other circumstance, the claimant would be unable to serve him personally, in which event the declaration might be delivered to one of the family, nailed to the door of the house, or in some other manner left upon the land. The service, in all cases, was proved by affidavit.

In the modern practice, where a summons is not distinguished from other process, the statute has provided the manner in which such summons shall be served. As a general proposition it is the duty of the sheriff to serve all process of summons, but in some states this rule has so far been departed from as to permit such service by private individuals. When served by the sheriff it should be returned into court with an indorsement of the service and the time same was had, and if served by a private individual such return must be verified by affidavit. Where the defendant is a corporation it may be served with process by leaving a copy thereof with its president, or some other officer in case he can not be found. Service on minors, or others under disability, must, as a rule, be personal, notwithstanding the appearance may be by guardian or conservator. As the action is brought against the person in possession it follows that there can be no substituted service by publication, although the statute, in some states, permits this form of procedure, where a party claiming proprietary rights in the land is beyond the jurisdiction of the court. This, however, is a modern innovation and is permitted only in those states where an action to quiet title may be united with an action of ejectment.

§ 83. Continued—Agents.—As the original design of the action contemplated only a recovery from the tenant in posses-

⁵⁰ As a general rule, in all actions for the recovery of land process was required to be served upon the land demanded. If the defendant appeared it was immaterial on what land he was summoned, but if he was not met with upon the land, in order

to avoid objections, it was customary to serve him personally wherever found and then to make a formal summons upon the land by erecting a stick or wand and affixing to it a copy of the summons.

sion no other party defendant was necessary and no other was generally permitted, except that a landlord might come in to defend his title when the person sued was his tenant. The statute has extended the scope of the action by permitting a joinder of parties claiming proprietary rights in the disputed premises, notwithstanding such parties may not be in actual occupation, or when they are only constructively in possession. This has resulted in many modifications of the earlier rules respecting parties and methods of service, and, in some states, where the defendant is a non-resident service may be had upon his agent residing in the state with the like effect as though made upon the principal. This, however, is a distinct departure from the primary ideas involved in the action, and, except in possible cases of corporations, wholly unnecessary for the determination of the right of possession. Even though the owner or claimant may be a non-resident or without the jurisdiction of the court, an efficient service may yet be had upon the person in possession, and if such person holds under the claimant he will be bound, as a rule, by the judgment that may be entered in the action. If the premises are unoccupied the demandant may enter without process, and, having acquired a peaceable possession may then, if so disposed, bring an action of *quia timet* in equity.

§ 84. **Owner out of possession.**—According to the old practice at common law the tenant or person actually in possession, being the one *prima facie* interested, was the party on whom the declaration was always served; and notwithstanding that it frequently happened that the lands in controversy belonged to some third person out of possession, to whom such service afforded no information of the proceedings, he was yet without a remedy against his tenant if he omitted to give notice of them. Nor was the landlord permitted to defend, even when he did receive notice, unless the tenant consented to become a co-defendant with him, and; to make matters worse, there existed no means by which a tenant could be compelled to appear and be made co-defendant. As will readily be seen this system occasioned great inconvenience to landlords. The tenants, either from negligence, fraud or collusion, frequently omitted to appear themselves, or to give to their landlords the

necessary notice, and although judgments against the casual ejector were often set aside upon affidavits of circumstances of this nature, the remedy was yet very incomplete.

The abuses which such a procedure permitted finally produced legislative interference for the regulation of appearances in the action and by statute the rights of the landlord were saved where he appeared and entered into the consent rule. These statutes were further amended from time to time until the landlord, whose tenant had been sued in ejectment, was permitted, upon his own motion, to appear and be made defendant in the action, while, as a further safeguard, it was provided that every tenant, when sued in ejectment by any person other than his landlord, should forthwith give notice of same under penalty of forfeiture of the value of several years' rent, variously fixed at from two to three years.⁵¹ These statutes have been substantially re-enacted in all or a majority of the states and represent the prevailing law on this branch of our subject.

Under a statute of this character it has been held that a judgment against the tenant, in an action of which the landlord had no notice, no more binds the landlord than would a judgment in any other legal proceeding to which he was not a party,⁵² and while the general rule that a tenant who has been evicted in fact, or against whom a judgment of ejection has been rendered in favor of a third person, may attorn to such person, or buy in his title and set it up against his landlord, may still hold good,⁵³ yet if such judgment is in any degree attributable to a neglect of the tenant's duty to his landlord, the rule does not apply.⁵⁴ The tenant is under a duty, when sued in ejectment, to notify his landlord of the pendency of such suit, and the mere fact that a pecuniary penalty is annexed to a breach of such duty does not, it seems, in any way relieve the tenant from performance or afford him an option of remaining silent and paying the penalty. The tenant cannot be permitted to take advantage of

⁵¹ The basic statute seems to be that of 11 Geo. II, c. 19.

⁵² *Oetgen v. Ross*, 47 Ill. 142; *Rogers v. Rippey*, 25 Wend. (N. Y.) 432; *Wheeler v. Byerss*, 4 Hill (N. Y.), 466

⁵³ *Foster v. Morris*, 3 A. K. Marsh. (Ky.) 609; *Lumsford v. Turner*, 5 J. J. Marsh. (Ky.) 105.

⁵⁴ *Lowe v. Emerson*, 48 Ill. 160.

his own wrong, and if he neglects this duty, and thereby prevents the landlord from protecting either the tenant's possession or his own reversion, he is guilty of such a degree of bad faith, that, when called upon by the landlord to surrender possession, he cannot be permitted to withhold same under a plea that he has been evicted by a paramount title under which he then claims to hold. On the other hand, if the tenant fully performs his duty, and the landlord fails to protect him in his possession, and he suffers a judgment of eviction, he may then protect himself by purchasing the paramount title or he may attorn to the evictor and take a lease from him.⁵⁵

§ 85. **Attorney's authority to bring action.**—It is fundamental that an attorney is not permitted to bring an action in the name of another without first receiving authority for that purpose, and should he assume so to do the suit should be dismissed as soon as the matter is brought to the attention of the court. Under the English practice this matter of authorization always formed an important feature in the institution of litigation. An attorney was not allowed to either prosecute or defend a suit unless he had a written warrant from the party interested. This constituted his authority for appearing in the case, and, it seems, was required to be filed in the court wherein the action was pending. This requirement, although at one time observed in this country, has now fallen into disuse and while the fundamental idea of authorization has been preserved the attorney may be effectively appointed by parol. He must, of course, be employed for the purpose, or, as the technical phrase puts it, retained in the cause, but, generally, where an appearance is entered a legal presumption is raised that he was duly retained.⁵⁶ Indeed, it has frequently been held that the license of an attorney is *prima facie* evidence of his authority to appear for any person whom he professes to represent, and this applies to either side of the action or any of its collateral branches.⁵⁷

⁵⁵ *Lowe v. Emerson*, 48 Ill. 160.

⁵⁶ See *Vorce v. Page*, 28 Neb. 294; *Dorsey v. Kyle*, 30 Md. 512; *Coward v. Clanton*, 79 Cal. 23. This follows from the fact that attorneys are officers of the

courts, and as such are expressly empowered to represent litigant parties. *Williams v. Johnson*, 112 N. C. 424.

⁵⁷ *Norberg v. Heineman*, 59 Mich. 210.

An attorney may, however, be compelled by the court, either of its own motion or at the instance of the opposing party to the suit, to show his authority for appearance or the right by which he assumes to represent the client. But, in order to invoke the exercise of this power of the court the general rule is, that the opposite party must state facts showing, or tending to show, that the attorney does not possess the authority which he assumes; otherwise, it would seem, the presumption arising from his license and appearance will prevail.⁵⁸

In the action of ejectment, however, much of the spirit and not a little of the old rules respecting authorization have been retained in many states. In these states a defendant in ejectment may, at any time before pleading, apply to the court wherein the action is pending for an order requiring the attorney for the plaintiff to produce in such court his authority for commencing the action in the name of any of the plaintiffs. It is not necessary, in such case, to aver or show any want of authority on the part of the plaintiff's attorney and it is sufficient that the application be accompanied by an affidavit of the defendant that he has not been served with proof, in any way, of the authority of the attorney to use the name of the plaintiff stated in the declaration. When such application is made it becomes the duty of the court to issue an order requiring production of the attorney's authority, and to stay all proceedings in the action until the same shall have been produced. This has long been the generally received rule and its observance seems to be very uniform throughout the United States.

It does not seem, however, that the proof of authority should be strictly formal. A written request, or a written recognition of such authority, duly proved by the affidavit of the attorney, or other competent witness, will be sufficient,⁵⁹ and if it further appears that previous to such application the defendant had

⁵⁸ In *People v. Mariposa Co.*, 39 Cal. 683, it was held that a mere affidavit of counsel that he is informed and believes that the opposing attorney was not authorized to appear on the trial, when unsupported by other evidence, is insufficient to overcome

the presumption. And see *Norberg v. Heineman*, 59 Mich. 210, where it was held that an attorney's authority to appear must be presumed, and that the adverse party cannot require the attorney to show his authority.

⁵⁹ *Strean v. Lloyd*, 128 Ill. 493.

been served with duly verified proof of the authority of the plaintiff's attorney to bring the action, the application should be dismissed.

§ 86. **Appointment of receiver.**—It would seem that the question, as to whether a receiver for the rents and profits of the land in controversy may be appointed pending an action of ejectment, has frequently been raised, yet the answers returned thereto, in the main, are agreed in a denial of such right. While a court of equity has inherent power to appoint a receiver for property in litigation, such appointment resting in the sound discretion of the court before whom the matter is pending, yet no such power is lodged in a court of law, and the action of ejectment, even in those states which have ostensibly abolished the old distinctions, is still at action at law as distinguished from a proceeding in equity. The law courts have always exercised the right to prohibit waste in actions of ejectment, but the right to take charge of the lands in controversy, through the intervention of a receiver, never seems to have been recognized, and where applications of this kind have been made they have usually been denied upon the ground that such an act would be an exercise of equitable powers which do not inhere in common-law courts.⁶⁰

It has been held, however, that in a proper case and upon due showing of equitable grounds, a receiver may be appointed, but this has occurred only in those states where legal and equitable relief may be administered in the same action⁶¹ or where ejectment is treated as an equitable remedy.⁶² In such states, if the plaintiff shows apparent title to the land and it further appears that a sequestration of the premises is essential to his protection; as that the defendant who is collecting the rents and profits is insolvent and will not be able to refund on account of

⁶⁰ See *Oehme v. Rucklehaus*, 50 N. J. L. 84, 11 Atl. Rep. 145; *Stephens v. Koga*, 142 Ind. 523; *Rollins v. Henry*, 77 N. C. 467; *Emerson's Appeal*, 95 Pa. St. 258; *Whitworth v. Wofford*, 73 Ga. 259; *Sengfelder v. Hill*, 16 Wash. 355; *Colburn v. Yantis*, 176 Mo. 670.

⁶¹ *Rogers v. Marshall*, Abb. Pr. N. S. 457, 38 How. Pr. (N. Y.) 43; *Whitney v. Buckman*, 26 Cal. 447; *Collier v. Sapp*, 49 Ga. 93; *Kron v. Dennis*, 90 N. C. 327.

⁶² *Emerson's Appeal*, 95 Pa. St. 258. And see *Bitting v. Ten Eyck*, 85 Ind. 360.

such insolvency in the event of an adverse verdict, or that the estate is being wasted through his incapacity and neglect, then a receiver may be appointed to hold the land pending judgment.⁶³ It has further been held that after judgment for the plaintiff he may be entitled to have a receiver appointed pending further legal proceedings,⁶⁴ or a bill may be filed in such case as an ancillary proceeding to the action at law.⁶⁵

The general rule, however, is as first stated and as the contest is merely to determine the legal title the reason of the rule is apparent.^{66a}

§ 87. **Precept to stay waste.**—The old books do not furnish us with much information relative to a proceeding in the action to restrain the commission of waste pending the litigation, though it would seem that where the defendant, after judgment against him, brought a writ of error he could be compelled to enter into a rule not to commit waste or destruction during the pendency of the writ. The essential idea of waste is, that it is a damage to the reversion done by a person in rightful possession. The only remedy at law is an action of trespass for the injury, and, as the person committing the waste is rightfully in possession it follows that there is no means of stopping the waste by a legal action so long as the right to possession continues. In such event the only remedy lies in the exercise of the prohibitive jurisdiction of equity. But, to secure a restraining order there must be no dispute in respect of the title⁶⁶ and where it is shown that the defendant is in possession under an adverse claim of right, courts have refused to interfere.⁶⁷ The tendency of modern decisions has been to moderate the rigor of the old rule, and where an ejectment has been brought and it is satisfactorily shown to the court that the defendant is insolvent, or that he will be unable to respond in damages in

⁶³ See cases last cited, and consult *People v. Mayor*, 10 Abb. Pr. (N. Y.) 111; *Rollins v. Henry*, 77 N. C. 467.

⁶⁴ *Whitney v. Buckman*, 26 Cal. 447; *Frisbee v. Timans*, 12 Fla. 300.

⁶⁵ *Ulman v. Clark*, 75 Fed. Rep. 868.

^{65a} *Davis v. Taylor*, 86 Ga. 506.

⁶⁶ *Cox v. Douglass*, 20 W. Va. 175; *Nethery v. Payne*, 71 Ga. 374.

⁶⁷ *Nevitt v. Gillespie*, 1 How. (Miss.) 108.

the event of a recovery by the plaintiff, an injunction may be granted until the title has been settled by an action at law.⁶⁸ It has further been held that it is not essential that the defendant be shown to be insolvent where it further appears that the waste sought to be restrained would, if allowed, produce an irreparable injury, or where it is of a malicious and destructive character.⁶⁹

The statute, in some cases, has further come to the aid of a plaintiff in ejectment by providing that the bringing of the action will not prevent a court from issuing a precept to stay waste and ruling a party to give security in such manner as the court may deem proper. All of this, however, is a doctrine of comparatively recent years, for of old, courts of equity would not restrain a trespass of any kind in any case where it appeared from the pleadings that there was a controversy respecting the title to the land. Waste is in the nature of a trespass because it is an injury to the freehold, but, as previously shown, it could be committed, if at all, only by a tenant or by some person whose estate or interest in the land was in privity with

⁶⁸ *Snyder v. Hopkins*, 31 Kan. 557; *Camp v. Bates*, 11 Conn. 51; *Erhardt v. Boaro*, 113 U. S. 537.

⁶⁹ *Newall v. Gravel Co.*, 11 Atl. Rep. (N. J. 1887) 495 (no off. rep.); *Taylor v. Collins*, 51 Wis. 123; *Wharf Co. v. Simpson*, 77 Cal. 286. In the case of *Lanier v. Alson*, 31 Fed. Rep. 100, the court declares that equity will not entertain a bill to enforce merely the legal title to land, and quotes from Lord Eldon, who said that in a bill for account, and an injunction to stay waste, stating that the defendant claimed by title adverse to the complainant, he stated himself out of court as to the injunction. Then the court, in the case cited, adds: "This doctrine has been greatly modified in modern times, and it is now a common practice where

irreparable mischief is being done or threatened, going to the destruction of the inheritance or of the estate—such as the extraction of ores from a mine, or cutting down timber, and for the removal of coal—to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title." See, also, *Erhardt v. Boaro*, 113 U. S. 537, from which case the language above quoted seems to have been taken. This last case refers to *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315, where numerous illustrations of the proper application of the doctrine will be found.

that of the complaining party. In such event courts of equity would always interpose by injunction to prevent the threatened injury. But, in such event also, there was never any dispute about the title. By degrees the ancient rule of noninterference by courts of equity with trespass to land, the title to which was in dispute, became much relaxed, and now, in many states, it is a common practice where irremediable injury is being done or threatened, for courts to issue a preventive writ to preserve the property from destruction pending legal proceedings for the determination of title.⁷⁰ The theory upon which this doctrine rests is, that great and irremediable injury may result in many cases if equity should refuse its aid in matters of this kind, particularly where the mischief sought to be enjoined goes to the destruction of the substance of the estate, such as the removal of minerals or the felling of timber. The action of ejectment, as a rule, proceeds slowly, hence, the subject-matter of the litigation, in many cases, might be virtually destroyed before a decision could be reached if the trespass were not restrained and the property thereby preserved during the pendency of the suit.

Usually, in order to obtain this protection, it must appear that an action of ejectment has been brought and is actually pending, but it is contended that the reason underlying the proceeding does not require the pendency of such suit, and that it is enough if the plaintiff shows his claim of title, the imminency of irreparable injury, and his intention to immediately put the question of title into a course of legal investigation and determination by an action of ejectment.⁷¹

§ 88. Continued—Remaindermen and reversioners.—The observations of the foregoing paragraph have reference to injunctions sought by rival claimants to the title and do not apply, as a general proposition, to remaindermen and reversioners. These classes have always been permitted to maintain an action, either preventive or compensatory, for any injury to

⁷⁰ *Erhardt v. Boaro*, 113 U. S. 44 Md. 251; *Piper v. Piper*, 38 537; *Freer v. Davis*, 52 W. Va. N. J. Eq. 81.
⁷¹ *Freer v. Davis*, 52 W. Va. 1; *Gause v. Perkins*, 56 N. C. 177. And see *Griffith v. Hilliard*, 64 Vt. 643; *Fulton v. Harmon*,

the inheritance by the tenant in possession,⁷² and, where such tenant is a dowress or tenant by curtesy, a forfeiture will in some cases be permitted. But this will be allowed, if at all, only where the waste has been both voluntary and permissive and of such a character as to indicate an utter disregard of the rights of the person next in succession.

§ 89. **Enjoining ejectment suit.**—It is within the province of equity to enjoin proceedings at law and this power may, in proper cases, be invoked to restrain the prosecution of an ejectment suit. But the indispensable basis upon which a defendant to an action at law may resort to a court of equity to restrain the prosecution of such action is, that he has some equitable defense of which a court of law cannot take cognizance, either by reason of want of jurisdiction or from infirmity of legal process. Hence, a court of equity would be without power to enjoin the prosecution of an action of ejectment on the ground that the conveyance relied on by plaintiff is void for want of delivery, or if delivered, that it was procured through duress, the defense in such case being complete at law.⁷³

⁷² Woodbury v. Willis, 50 Me. 403; Lund v. New Bedford, 121 Mass. 286; Potts v. Clarke, 20 N. J. L. 536. ⁷³ Bishop v. Chiniquy, 74 Ill. 317.

CHAPTER VI.

PARTIES TO THE ACTION.

- I. GENERALLY CONSIDERED.
- II. SPECIAL CLASSES OF PARTIES.
- III. HUSBANDS AND WIVES.
- IV. MORTGAGORS AND MORTGAGEES.
- V. VENDORS AND PURCHASERS.
- VI. LANDLORDS AND TENANTS.
- VII. OFFICERS AND FIDUCIARIES.
- VIII. MUNICIPALITIES.

I. GENERALLY CONSIDERED

§ 90. Preliminary views.	§ 100. Tenants in common.
91. Plaintiffs.	101. Coparceners.
92. Defendants.	102. Joint-tenants.
93. Continued—Persons not in possession.	103. Insane persons.
94. Joinder of parties — Plaintiffs.	104. Infants.
95. Continued — Hostile claimants.	105. Death of parties—De- fendants.
96. Joinder of parties — Defendants.	106. Continued—Plaintiffs.
97. Continued — Separate trials.	107. Interveners.
98. Improper joinder of par- ties.	108. Servants and employees.
99. Non-joinder of parties.	109. Purchasers <i>pendente lite</i> .
	110. Corporations.
	111. Railway companies.
	112. Entry under right of eminent domain.
	113. Trespassers.

§ 90. Preliminary views.—It will be remembered that during the early stages of the action of ejectment it was instituted upon a feigned issue made up by fictitious parties. The nominal plaintiff and the casual ejector were judicially regarded as the persons of a fictitious form of an action really brought by the lessor, the actual plaintiff, against the tenant in possession, and this fictitious form of action was designed and intended to force the real parties to trial upon the merits, without being entangled in nicety of pleadings on either side. The

lessor of the nominal plaintiff and the person in possession were substantially the only parties to the suit, and notwithstanding the apparently circuitous method by which the real defendant was brought in the subsequent proceedings were neither complicated nor unwieldy.

In the modern adaptation of the action the entire spirit of the ancient remedy has been retained. Its object, now as then, is to force an issue between the parties who assert conflicting claims, without needless delay or verbose pleading, but the circumstances which inspired the fictions no longer exist and the ends of justice are better subserved by a direct prosecution of the suit in the names of the real parties in interest.

§ 91. **Plaintiffs.**—While the parties to a suit in ejectment are now specifically provided for by statute it may yet be stated, as a primary rule of general observance, that all actions must be prosecuted in the name of the legal owner. In some states this rule has been modified and the “real party in interest” must bring the action, but, in any event, to maintain such action, the plaintiff must have, at the time suit is instituted, a valid subsisting right in the lands claimed, or of some share, interest or portion thereof, which entitles him to possession.⁷⁴

In the case of sole ownership this last statement will present few difficulties, but a large amount of controversy has arisen in cases where one of several cotenants has brought an action against a stranger. The rule is fundamental that each cotenant, irrespective of the character of his tenancy, is entitled to the possession of the entire property as against all persons except his fellow-tenant, and, as a logical sequence, it would seem that he might maintain ejectment for the whole thereof as against one who has no title. This view has been adopted by a number of courts of last resort and it has been held that, under a general allegation of seizin, notwithstanding the proof may show another joined with him in interest, it will be sufficient for the plaintiff to establish any estate in the lands that will give him a right to the possession.⁷⁵ In many states, how-

⁷⁴ *Nelson v. Triplett*, 81 Va. 236; *Perciful v. Platt*, 36 Ark. 456; *Baro v. Fennell*, 24 Fla. 378.

⁷⁵ *Stark v. Barrett*, 15 Cal. 362; *Hibbard v. Foster*, 24 Vt. 542; *Mather v. Dunn*, 11 S. Dak. 196; *Sharon v. Davidson*, 4 Nev. 416.

ever, this view is rejected,⁷⁶ so that it would appear that the question is a debatable one, to be determined by local policy. This phase of the subject will be treated in detail further on.

Under present laws relating to amendments it is possible in many states to substitute plaintiffs after the action has been commenced, but where this is permitted the new plaintiff is regarded as standing in the shoes of the first plaintiff and must rely on the title which he possessed at the commencement of the action.⁷⁷

It is a further general rule that the plaintiff must have been disseized at the time action is brought, and one who is in the actual and exclusive possession of land cannot maintain ejectment therefor against a person not in possession, but who merely claims title thereto.⁷⁸

A number of questions are presented where the plaintiff sues in an official capacity or where he asserts the right of possession in a fiduciary or ministerial character. Usually, the real party in interest can alone maintain the action. So, too, difficult questions will sometimes arise growing out of the peculiar relations sustained by the parties. In the succeeding paragraphs of this chapter an attempt will be made to discuss these questions and to deduce the rule that should be applied. Necessarily the discussions must be brief, and those matters only will be alluded to that are directly involved in the action. The rights, powers, and duties of officers and fiduciaries can only be incidentally touched. The capacity of parties to bring the action will also receive but a passing mention, it being assumed that the reader will have recourse to special works when questions of much doubt or difficulty may intervene. Enough will be shown, however, to intelligently present the subject in the phases that are usually encountered in practice.

§ 92. **Defendants.**—The original and primary object of the action of ejectment was the recovery of the possession of a freehold, and, while the establishment of title is now the prin-

⁷⁶ *Marshall v. Palmer*, 91 Va. 344; *Johnson v. Hardy*, 43 Neb. 368.

⁷⁷ *Barrett v. Birge*, 50 Cal. 655.

⁷⁸ *Carmichael v. Argard*, 52 Wis. 607; *Brown v. King*, 107 N. C. 313; *Steinman v. Vicars*, 99 Va. 595.

ciple end to be attained—the right to the possession following the title—the same general rules that characterized the remedy while it was purely a possessory action are retained. Hence, if the premises for which the action is brought are actually occupied by any person, such actual occupant should be named as defendant in the suit.⁷⁹ If the premises are not occupied, the action should be brought against some person exercising acts of ownership thereon, or claiming title thereto or some interest therein, at the commencement of the suit.⁸⁰ The statutes now in force in most of the states also provide for the settling of disputes concerning the title generally, and under these statutes all persons claiming title to or interests in the lands in question, and whose rights or claims are sought to be precluded, may also be made parties defendant.

Where only the right of possession is involved the person in actual occupation of the premises is always a necessary party defendant,⁸¹ and, usually, none other need be named, the theory being that if judgment is recovered against such occupant it binds those under whom he occupies as well.⁸² Persons not in possession, in a case similar to that last mentioned, when claiming possessory rights, are proper but not necessary parties defendant. Where the land is unoccupied ejectment is generally maintainable against the person claiming title alone,⁸³ but if the land is occupied the occupant must be made a party,⁸⁴ and, it seems, that an action against the claimant without joining the occupant will not lie. Thus, the action will not lie against a landlord only where the land is in possession of a tenant.⁸⁵

In any event, unless the party made defendant is in possession, actually or constructively, or, in case of vacant or unoc-

⁷⁹ C. & E. I. R. R. Co. v. Clapp, 201 Ill. 418; Keane v. Cannovan, 21 Cal. 293; Shaw v. Tracy, 95 Mo. 531; Losee v. McFarland, 86 Pa. St. 33; Hoyt v. Southard, 68 Mich. 432.

⁸⁰ Burchard v. Roberts, 70 Wis. 111; Anderson v. Court-right, 47 Mich. 161; Stearns v. Harman, 80 Va. 48.

⁸¹ Shaw v. Tracy 95 Mo. 531;

Losee v. McFarland, 86 Pa. St. 33.

⁸² C. & E. I. R. R. Co. v. Clapp, 201 Ill. 418.

⁸³ Burchard v. Roberts, 70 Wis. 111.

⁸⁴ Dutton v. Warschauer, 21 Cal. 609.

⁸⁵ Shaw v. Tracy, 95 Mo. 531; Grundy v. Hadfield, 16 R. I. 579.

cupied lands, unless he asserts a claim of title or a right to the possession, the action will not lie against him.⁸⁶

§ 93. **Continued—Persons not in possession.**—The right to institute an action against a person not in the actual or constructive possession of land, but who merely claims an interest therein or title thereto, is distinctly an innovation of the statute. But under modern codes this right is now given and may be freely exercised. The policy of the statute is to quiet title by an action at law and notwithstanding some apparent incongruities such policy has now become firmly established as a part of our jurisprudence. The object is to compel persons out of possession, who set up false claims to land, to submit their claims to a test and by a verdict and judgment in the action to have such claims effectually determined.⁸⁷ If the wrongful claim is founded in either fraud or mistake, and the rightful owner is so situated that he cannot bring ejectment, a court of equity will, upon a proper case made, take jurisdiction and extend relief by causing the delivering up, cancellation or rescission of agreements, securities, deeds or other instruments, but where the question involved is purely one of title the action of ejectment is the peculiarly appropriate remedy and not an action in equity to quit title.⁸⁸ The fact that the defendant is not in actual possession, is, under the statute, immaterial. If he claims title he may properly be made a party defendant.

§ 94. **Joinder of parties—Plaintiffs.**—As a general rule all interested parties may be joined, either as plaintiff or defendant, in an action for the recovery of lands. This is a distinct innovation upon the old rule and is created by the liberal provisions of the statutes. With respect to parties plaintiff, however, there is much uncertainty in the decided cases. Where there are several parties holding undivided interests in the land sought to be recovered, if such interests are joint then it would seem, on principle, that all should be joined. But if there is no community of interest, as in the case of tenants in

⁸⁶ *Slisson v. Cummings*, 106 N. Y. 56; *Carmichael v. Argard*, 52 Wis. 607; *Long v. Railroad Co.*, 89 Ky. 544; *Liggett v. Lozier*, 133 Ind. 451.

⁸⁷ *Harvey v. Tyler*, 2 Wall. (U. S.) 328; *Banyer v. Emple*, 5 Hill (N. Y.), 48.

⁸⁸ *Stearns v. Harman*, 80 Va. 48.

common, the principle does not apply, while the statute has very generally given to cotenants the right to institute suits without joining their fellow-tenants and to recover possession of their own shares. The conflict of authority is over the right of one such cotenants to maintain the action for a recovery of possession of the entire property without joining the other owners of the undivided interests. Upon this point there is much dispute. One line of cases strenuously insists that this procedure is proper,⁸⁹ another denies the right and confines the recovery to the specific degree of interest to which the plaintiff may show himself entitled upon the trial. In other words, one tenant in common cannot recover for the joint benefit of himself and his cotenant but is limited to his own *aliquot* share or part.⁹⁰ It is contended that the statute permitting tenants in common to join in an action would be rendered useless if one can recover for the others and that the effect of such a rule would be to permit A to recover for B even though B, for any reason, could not recover for himself.⁹¹ It will be perceived, however, that the question of joinder, in the phase now under discussion, does not extend so much to the right to maintain the action as to the degree of recovery that can be had under it.

§ 95. **Continued—Hostile claimants.**—While all persons having an interest in the subject of an action and in obtaining the relief demanded, may, under modern codes of procedure, be joined as plaintiffs, yet this does not permit the joinder of two distinct and entirely separate causes of action. Particularly is this true where the pleading, upon its face, shows that the claims are hostile to each other and that one practically nullifies the other. Hence, two persons, each of whom claims the entire tract by a title hostile to that of the other, cannot unite as plaintiffs in an action of ejectment against a third party who may be in possession.⁹²

§ 96. **Joinder of parties—Defendants.**—It has sometimes been doubted whether other parties could be joined as defend-

⁸⁹ See *Johnson v. Schumacher*, 481; *King v. Hyatt*, 51 Kan. 504; 72 Tex. 334; *Moulton v. McDermott*, 80 Cal. 629; *Smith v. Tankersley*, 20 Ala. 272.

Johnson v. Hardy, 43 Neb. 368.

⁹¹ *King v. Hyatt*, 51 Kan. 504.

⁹² *Hubbell v. Lerch*, 58 N. Y.

⁹⁰ *Mobley v. Bruner*, 59 Pa. St. 237.

ants where the premises are actually occupied and no privity is claimed or shown between such actual occupant and the added parties. The reasoning in such cases is based upon the course of procedure in the original action, or of those cases where a writ of right was prosecuted. In the former, the action could be brought only against the tenant in possession or the casual ejector, in which event notice was required to be given to the tenant in possession if there was one; in the latter, the suit was brought only against the tenant of the freehold demanded. In neither case could persons claiming title through independent and distinct sources be joined as defendants, and, if they were, the misjoinder might be pleaded in abatement. And so we find it has been held in some of the earlier cases and with reference to then existing statutes, that, where the premises are occupied, persons not in possession cannot be made defendants to the action.⁹³ It was contended in support of this doctrine that the effect of the judgment was to conclude all persons in privity with the occupant, and therefore no necessity existed for making any other than the occupant a defendant to bind all persons in privity by a recovery, and that, if there was no privity between the party in possession and the others joined as defendants, it would involve the trying of two or more separate distinct titles and causes of action in one suit, and for this reason an abatement was allowed.

But under the statute now generally in force, while the party in possession or actual occupancy must be made a party defendant, yet all others claiming title to or interests in the premises may be joined with him and this, it seems, without respect to privity of title or unity of interest. The manifest object of the statute so phrased seems to be, to obviate the hardship and inconvenience imposed upon the demandant by the operation of the old rule. Under this rule, as stated above, if the premises were occupied suit could be brought only against the tenant in possession with the right to bring in the landlord under whom he claimed, if there was one. As to other adverse claimants there was no way by which the plaintiff could try his title in ejectment, and, after recovering from the tenant in possession

⁹³ See *Hanson v. Armstrong*, 22 Ill. 44

he was compelled to resort to as many suits in equity as there were claimants in order to relieve himself from the burdens such claims imposed. Hence, it would seem that where the statute permits a joinder of other parties with the actual occupant, its true intent is that the plaintiff may, in one action, try his title to the land in controversy against all persons in possession or asserting claims thereto, irrespective of the origin or nature of such claims, and without respect to the question of privity.⁹⁴ It is to be regretted that the adjudicated cases shed but little light on this particular phase of the law and the question may be considered, to some extent, as unsettled. As has been said, it is anomalous in the law of ejectment to permit the trial of several distinct issues in the same cause, but such seems to be its present tendency.

§ 97. **Continued—Separate trials.**—If a number of persons are joined as defendants a question of much difficulty is presented where the parties, although in possession of parts of the land, have no common interest. It has been held, in such a case, that it is proper for the court to order separate trials, and that the court may do this on its own motion when it becomes apparent that the several parcels of land in controversy are separate and distinct and that the several defendants rely upon different sources of title. If this were not permitted, the rule allowing the plaintiff to join as defendants all who are in possession of the tract for which he sues would be productive of great inconvenience and injury.⁹⁵

But while the foregoing will undoubtedly be the proper practice to pursue in the case of joint defendants claiming separate parts of the land under independent titles, yet, notwithstanding that they may file separate answers if they shall consent that the several actions shall be consolidated and tried as one case, a judgment may be rendered against all for the possession of the entire premises instead of against each for the part occupied.⁹⁶

⁹⁴ For a learned and lucid discussion of this phase of the law of ejectment, see opinion by Shope, J., in *South Park Commissioners v. Gavin*, 139 Ill. 280. And see *McCoun v. Hannah*, 3

Oreg. 302; *Judson v. Malloy*, 40 Cal. 299.

⁹⁵ *Judson v. Malloy*, 40 Cal. 299.

⁹⁶ *Andrews v. Carlisle*, 20 Colo. 370.

§ 98. **Improper joinder of parties.**—The general rules of pleading govern the methods of procedure in the action of ejectment. Hence, if a person has been improperly joined as a party, objection to such misjoinder should be taken by demurrer, where the defect appears on the face of the pleadings, and, if not so taken, the objection will be deemed to have been waived.⁹⁷ In any event, the objection should be brought before the court at the earliest possible moment, and if a person allows verdict and judgment to go against him, without having interposed an objection, he will be bound thereby and cannot be relieved in an appellate court.⁹⁸

This doctrine is based on the familiar principle that parties litigant cannot be permitted to assume inconsistent positions in court. If they elect to adopt a certain course of action they will be confined to the course which they adopt, for courts will not permit their procedure to be trifled with by allowing parties to play fast and loose. If, then, a person assumes the role of a necessary party defendant, and particularly if he pleads to the merits, he cannot, after being cast in the suit, change front and insist that it was error to make him a defendant.⁹⁹

§ 99. **Nonjoinder of parties.**—The rules which apply in the case of misjoinder are much the same where there has been a failure to join necessary parties, and such nonjoinder, when apparent on inspection of the declaration, should be taken advantage of by demurrer. If the defect is disclosed upon the trial, objection should be raised before the case is submitted to the jury. If this is not done the right to raise the question of defective parties will be considered waived and it will be too

⁹⁷ See *Bensieck v. Cook*, 110 Mo. 173; *Metcalfe v. Brand*, 86 Ky. 331; *Grain v. Aldrich*, 38 Cal. 514; *Hinchman v. Railroad Co. v. 17 N. J. Eq.* 75.

⁹⁸ As where a son resides in his father's family on the lands in controversy, but who does not assert any ownership or right of possession therein. *Drake v. Root*, 2 Colo. T. 685.

⁹⁹ *Bensieck v. Cook*, 110 Mo. 173. In this case a married

woman in the actual occupation of the land, but whose husband was insane and confined in an asylum, was made defendant. Both were served with summons. After judgment had been rendered against her she assigned as error that a wife is not a necessary party, but as she had appeared and contested the action the court held that she was bound by result.

late to bring same forward on a motion for a new trial.¹ A familiar case of nonjoinder is presented where the action is brought against the owner of the freehold only, and the premises, at the time, are in the actual possession of a tenant. In such event the action cannot be maintained if timely objection is made, the tenant in possession being a necessary party.²

§ 100. **Tenants in common.**—As tenants in common have several freeholds in the common property, notwithstanding their joint possession, the rule was that they should always be severally impleaded. The statute, however, now regulates the relation and provides the manner in which actions may be brought for the recovery of the common land. The subject receives frequent allusion in other places and will not further be adverted to here.

§ 101. **Coparceners.**—The estate in coparcenery, as it existed at common law, has been abolished by statute and the *status* of those who otherwise would sustain the relation has been reduced to that of tenants in common. While the name has been retained to indicate a tenancy accruing by descent and not by purchase, yet this is about all that has survived. The incidents of the relation are no different from those which affect tenants in common generally, including rights pertaining to the possession of land and the remedies that may be resorted to for their vindication or protection.

At common law, coparceners, though several persons, were regarded as but one heir, having but one entire freehold in the land before partition. Hence, it will be seen that in a real action, at common law, all of the parceners are required to join, for their remedy must necessarily follow the nature of their possession, and this being joint the remedy must be joint also. In modern practice, and under the statutory modification of the relation, they are governed by the same rules that apply to tenants in common generally and the action may be joint or several as may best suit their convenience. In the latter case the recovery would be limited to the actual share of the parcener.

¹ *Mather v. Dunn*, 11 S. Dak. 196; *Coulson v. Wing*, 42 Kan. 507.

² *Shaw v. Tracy*, 95 Mo. 531.

§ 102. **Joint-tenants.**—The estate of joint-tenancy has now become very infrequent in the United States. While the statute still permits the creation of estates of this kind the general policy of the law is to discourage them, except where land has been conveyed to trustees. In the absence of express words of limitation all joint estates, with the exception mentioned, are considered and taken as tenancies in common. Where, however, the limitation expressly creates a joint-tenancy the law will give it effect and the tenants must jointly sue as well as be jointly sued, the common law incidents in this respect being of binding force and efficacy. It was permissible, however, at common law, where one of two joint-tenants disseized the other, for the latter to recover against his cotenant in an action of ejectment,³ and this right has been substantially preserved by statute in the modern action.

§ 103. **Insane persons.**—While a person suffering from mental derangement is under many disabilities he still has a legal capacity to sue and be sued in a proper form of action and under such restrictions as may be provided. If such a person is in possession of lands, either actually or constructively, or claims an interest in or title to the same, he is a proper party defendant. In such event his interests may be protected by the appointment of a guardian *ad litem*,⁴ and the power of the court to appoint such guardian, of necessity, concedes the power, upon a proper basis of facts being presented, to render a judgment as binding on the insane person and his property rights, as a similar judgment would be upon a sane person.⁵

§ 104. **Infants.**—The proprietary rights of an infant are not distinguishable from those of an adult, notwithstanding that for many purposes he is under a legal disability. The statute requires the action of ejectment to be brought in the name of the real party in interest and against the actual party in possession. To satisfy these requirements it is essential that where an infant is the actual claimant the action should be commenced in his name, and that, notwithstanding the defend-

³ 1 Roscoe, Real Actions, 9.

⁵ Bensleck v. Cook, 110 Mo.

⁴ Mitchell v. Kingman, 5 Pick. (Mass.) 431; King v. Robinson, 33 Me. 114.

173, 33 Am. St. 422.

ant is under age he should yet be named as defendant. There is no technical difficulty in this procedure as an infant may always appear by his next friend or statutory guardian, and in like manner may defend by a guardian *ad litem*. It may be, where the statute expressly confers a right of property and possession upon a guardian that he may sue in his own name to recover his ward's land.⁶ This was the case at common law with respect to guardians in socage, but in the United States this form of guardianship does not exist and the decisions seem strenuous in their announcement that a suit in ejectment for the ward's lands must be prosecuted in the ward's name.⁷

§ 105. **Death of parties—Defendants.**—At common law the death of the defendant in a real action worked an abatement of the suit, but this seems to have been remedied by statute at quite an early day,⁸ and the person next in interest might be compelled to appear and defend. This principle has been preserved in the statutory action of ejectment provided in the United States, and upon the death of the defendant all persons interested in the estate may be cited to appear and the action may be further prosecuted against them.¹⁰ Upon their appearance they may set up title in themselves, acquired from the deceased defendant, or from any other source.¹¹ It is imperative, however, that such persons be brought in, for otherwise there would be no defendant in court against whom judgment could be given for the land. Nor would it be sufficient merely to bring in the administrator for, as he could not be a tenant of the freehold, he could not be charged with being a disseizor.¹² And even though a judgment should be rendered in such a case it could not affect the heirs.¹³

But where a revivor is had in an action of ejectment on the suggestion of plaintiff against one as heir of the original defendant, it is incumbent on the plaintiff to see that the person so

⁶ See *Torry v. Black*, 58 N. Y. 188.

⁷ *Vincent v. Starks*, 45 Wis. 458; *Muller v. Benner*, 69 Ill. 108.

⁸ 17 Car. II, c. 8.

¹⁰ *Guyer v. Wookey*, 18 Ill. 536; *Barrett v. Birge*, 50 Cal.

655; *Trask v. Trask*, 78 Me. 103.

¹¹ *Brunswick Sav. Inst. v. Crossman*, 76 Me. 577.

¹² *Trask v. Trask, Adm'r*, 78 Me. 103.

¹³ *Bridgham v. Prince*, 33 Me. 174.

brought in is a proper party, for if it shall appear that such person is not the heir of the original defendant, and does not claim under him, but is in possession under a claim of independent and adverse title, the whole proceeding will be erroneous.¹⁴

If there are several defendants, and one of them dies at any time before judgment, the action will not thereby abate but the plaintiff, on suggesting the death of such defendant upon the record, may proceed against the survivors. But, if the plaintiff should proceed to trial, without such suggestion, and obtain judgment against all of the defendants, this would be error, as there cannot be a judgment against a person not in being.

§ 106. **Continued—Plaintiffs.**—With respect to parties plaintiff the rule is not so clear and local usage must be resorted to for the determination of many questions of this kind. It seems to have been the rule at common law that the death of any party, either plaintiff or defendant, and whether joint or sole, would abate an action. When the cause of action survived such persons as possessed the right might institute a new action.¹⁵ Where the cause of action was a contract the personal representatives might prosecute it, and by the early English statutes, which are generally regarded as part of the common law, actions for the recovery of chattels and some actions of tort were also allowed to be maintained by the administrator. It is contended that under an equitable construction of these statutes, all rights of action for the recovery of property, whether real or personal, survive to the personal representative, including actions of ejectment.¹⁶ But as ejectment is an action to try the right of possession and not merely to recover for an injury to possession, it was essential under the old practice that the fictitious demise should be laid in the name of the party legally entitled to the possession, and the judgment fixed the possessory right. In the modern action the principle has not been changed, and, for this reason, the successor of the title and not the administrator would seem to be the proper person to continue the action. This was the view entertained by the revisers of the statutes when the old

¹⁴ *Richter v. Beaumont*, 71 Miss. 713.

¹⁵ 1 Chit. Pl. 58.

¹⁶ 3 Redf. Wills, *177.

action was abolished by the legislature of New York in 1830, and in the new procedure it was provided, that the action should not abate by reason of the death of the plaintiff but that the same proceedings might be had, as in other actions, to substitute the names of those who should succeed to the title of the plaintiff so dying, in which case the issue should be tried as between the original parties.¹⁷

The provision above noted has been generally adopted, either in form or substance, by the other states. At the present time, for all purposes of survivorship the action is not regarded even technically as for a tort,¹⁸ and if the plaintiff dies before verdict his heirs may be substituted and may prosecute in their own right.¹⁹ If he dies after verdict they may be added as representatives, and obtain judgment thereon.²⁰ If the plaintiff dies before trial his heirs may revive the suit and have judgment.²¹ This may be taken as the generally received doctrine, although in some states, where the administrator is vested with a primary control during the period of administration, a somewhat different rule would seem to prevail. This phase of the subject will be further discussed in speaking of personal representatives.

Where the doctrine, as stated, is permitted to obtain, if there are several plaintiffs and any of them die before final judgment the death may be suggested on the record, and the heir or devisee of the deceased party may be admitted to prosecute the suit with the survivor in the same manner as if he had originally joined with him in commencing the action. If they do not join within a reasonable time, to be fixed by the court, the surviving plaintiff may prosecute the suit for so much of the premises in question as may then be claimed by him.

¹⁷ See R. S. N. Y., pt. 3, chap. 5, tit. 1, § 32. Under the ancient practice, as the plaintiff was merely nominal, the courts looked upon the lessor of the plaintiff as the real person concerned in the litigation and would not suffer him to be deprived of his remedy by the death of the nominal plaintiff.

Indeed, it was held to be a contempt of court to suggest or assign for error the nominal plaintiff's death.

¹⁸ *Guyer v. Wookey*, 18 Ill. 536. 536.

¹⁹ *Funk v. Stubblefield*, 62 Ill. 405.

²⁰ *Milliken v. Marlin*, 66 Ill. 13.

²¹ *Milliken v. Marlin*, 66 Ill. 13.

It will be understood that the foregoing remarks have reference to estates of freehold only. If the object of the recovery is a leasehold, then, since it is a cause of action arising on contract and the interest, if recovered, is for practical purposes a chattel, the executor or administrator would properly be substituted on the record and the recovery would be an asset for distribution in the usual course of administration.

§ 107. **Intervenors.**—The subject-matter in litigation in the action of ejectment is not the land itself, but the right to the possession of such land. Hence, a person unconnected with the right of possession asserted by either plaintiff or defendant, but claiming by a title paramount to both, cannot intervene or make himself a party to the action.²² Where a third party who shows no interest in common or privity of right between himself and the other litigants, but who claims by an independent ownership, petitions to be made a party, the petition should be denied.²³ The reasons which prevent the intrusion of a third party in a litigation already commenced apply with the same force where an effort is made by the defendant to introduce a stranger to the title in suit as a codefendant.²⁴

§ 108. **Servants and employees.**—While the subject is not altogether free from doubt the better opinion would yet seem to be, that where a person is in the actual occupation of land only as an incident of his employment he is not to be regarded in the same light as a tenant and his possession is more like that of a servant. And where the occupation of land by a servant is connected with the service, or is required by the employer for the necessary or better performance of the service, the possession is always that of the master.²⁵ This raises some interesting questions in an action brought for the recovery of the land. It is a rule, both of the common law and of the statute, that if the premises, for the recovery of which the action is brought, are actually occupied by any person such occupant shall be named as defendant in the suit. The rule is broad enough to embrace every kind of occupancy and if lit-

²² *Porter v. Garrissimo*, 51 Cal. 559; *Colgrove v. Koonce*, 76 N. C. 363.

²³ *Files v. Watt*, 28 Ark. 151.

²⁴ *Longdon v. Clouse*, 1 Atl. Rep. (Pa.) 600.

²⁵ *Chatard v. O'Donovan*, 80 Ind. 28.

erally construed would include persons who are in the nominal possession of land merely as servants or employees of the adverse claimant. And this was the construction given to it in the earlier decisions.²⁶

Modern authorities reverse this holding and announce that such persons are not to be regarded as occupants within the meaning of the law, and notwithstanding such occupancy, the rule at present would seem to be that an action of ejectment cannot be maintained against them.²⁷ At all events, mere employees of the defendant who have simply been permitted to reside upon the lands in controversy at the time suit is brought, and who claim no rights or interests therein, are not necessary parties defendant.²⁸

The general rule, that ejectment must be brought against the party really interested in the possession, and not against the mere agents or employees by whom his occupancy is maintained, only applies, however, to cases where the principal or employer may be sued. If the employer is not amenable to an action the rule fails, and the agent, servant or employee becomes the proper party defendant.²⁹

§ 109. *Purchasers pendente lite.*—It is now among the best established rules of law, that where a person enters under a defendant, during the pendency of a suit to recover the land upon which such entry is made, he will be bound by any judgment that may be rendered in the suit notwithstanding he was not a party thereto. Hence, a purchaser from the defendant is held chargeable with notice of the character of the suit and of the extent of the claim asserted in the pleadings in reference to the land, even though he may be without notice in point of fact.³⁰ The plaintiff, in such case, is wholly exempted from

²⁶ *Doe v. Stradling*, 2 Starkie (Eng.), 187. And see *Shaver v. McGraw*, 12 Wend. (N. Y.) 558.

²⁷ *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 148; *Danihee v. Hyatt*, 151 N. Y. 493; *Lattle-Morrison v. Holladay*, 27 Oreg. 175; *Polack v. Mansfield*, 44 Cal. 36.

²⁸ *Shaw v. Hill*, 83 Mich. 322,

21 Am. St. 607; *Danihee v. Hyatt*, 151 N. Y. 493.

²⁹ Thus, ejectment may not be brought against the United States, but will lie against an agent or officer of the United States in possession. See *Polack v. Mansfield*, 44 Cal. 36.

³⁰ *Hurd v. Coleman*, 42 Me. 182; *Tilton v. Coffield*, 93 Wis. 168.

taking any notice of the title so acquired and such purchaser need not be made a party.

The reason of this rule is founded in necessity and the rule itself is applied in furtherance of public policy. Were it otherwise, alienations made during the pendency of a suit might defeat its whole purpose, and there could be no end to litigation.

§ 110. **Corporations.**—The general rule is, that in the enforcement and protection of its rights a corporation has the same capacity as an individual, and may be sued in the same manner. Hence it may, in its own name, prosecute all such real and possessory actions as may be necessary. This right seems to have been implied at common law and is expressly conferred by the statutes which provide for the creation and regulation of corporations.

Where, after the beginning of suit, the plaintiff corporation, by consolidation, becomes merged in a new corporation, in which the plaintiff's proprietary right is vested, the new corporation should be substituted as plaintiff.⁸¹

§ 111. **Railway companies.**—For lands to which it has title a railway company may maintain the same actions as other corporations. But in the case of railway companies we find a number of rights not possessed by the ordinary corporation, and among these is the right to condemn lands under the eminent domain of the state. Where land has been thus condemned a railway company may maintain ejectment for its recovery, since the company acquires more than a mere easement or right of way, in that it has the right to possession for all purposes. Nor is such right affected by the fact that the land is not necessary for present use.⁸²

§ 112. **Continued—Entry under right of eminent domain.**—It is a fundamental law that private property shall not be taken or damaged for public use, against the will or without the consent of the owner, unless just compensation shall be made therefor, but, as a rule, corporations clothed with the right of eminent domain may always enter upon the land of private owners upon giving security for the payment of the damages that may accrue from the entry when the amount of

⁸¹ *Wiggins Ferry Co. v. Railroad Co.*, 163 Ill. 238.

⁸² *Pittsburgh, etc. Ry. Co. v. Peet*, 152 Pa. 488.

such damages shall have been ascertained. In such case a right of entry is established by virtue of the statute and without regard to the consent of the owner. But unless such entry is made in compliance with the law or in pursuance of a treaty with the owner, it will amount to a trespass for which an action will lie, either for damages or ejectment as the owner may elect.³³

Where, however, the entry is made with the knowledge and consent of the owner, notwithstanding there has been no divestiture of title, either by conveyance or condemnation, the corporation does not thereby become a trespasser and the owner is regarded as having so far parted with possession as to estop him from attempting to resume the same or to defeat the right of the corporation to proceed under the statute. Nor does it seem that such consent need be openly expressed, for if the owner is passively derelict in knowingly permitting the corporation to occupy and place its improvements on his land, this will be regarded as a permissive entry, and its effect the same as if a formal contract had been entered into by which the landowner had agreed to put the corporation into possession and accept as compensation such sum as might be awarded to him by proceedings under the general law.³⁴

§ 113. **Trespassers.**—Notwithstanding a person may have entered upon lands without a claim of right, yet, if his entry was peaceable, his occupation will be so far protected that no one, of his own motion, will be permitted to evict him with force and arms or to forcibly interfere with his possession. Having acquired a peaceable possession of the land he will be presumed to be there rightfully and not even the owner may forcibly eject him unless duly authorized by a legal process issued by some court of competent jurisdiction.³⁵ At common

³³ *Oliver v. Railroad Co.*, 131 Pa. St. 408; *Terre Haute, etc. R. R. Co. v. Rodel*, 87 Ind. 128; *Smith v. Railroad Co.*, 67 Ill. 191. In this case the interest of the life tenant was condemned, but no steps were taken against the remainderman. *Held*, that ejectment would lie at the suit of the owner of the fee.

³⁴ See *Oliver v. Railroad Co.*, 131 Pa. St. 408; *St. Johnsbury, etc. R. R. Co. v. Willard*, 61 Vt. 134.

³⁵ *Van Auken v. Munroe*, 38 Mich. 725; *Austin v. Bailey*, 37 Vt. 219; *Illinois, etc. Coal Co. v. Cobb*, 82 Ill. 183.

law the owner might always enter by force and retake lands in the possession of a trespasser, but as this frequently led to breaches of the peace a statute was enacted³⁶ providing that no one should thenceforth make entry into lands except where the right was given by law, and then only in a peaceable manner. This statute, either by re-enactment or recognition, has become a part of our own law, and summary remedies for the restoration of persons violently dispossessed now exist in all of the states. In these actions the question of title is not raised nor will a plea of this character be permitted.³⁷ The only question presented is the fact of forcible entry and when this is satisfactorily shown a restoration of possession will be ordered and the question of title will be left to the parties to be determined by an action of ejectment.

Where a person enters upon lands without right and in a violent and forcible manner the owner may at once resort to his action of forcible entry and compel a restoration of possession without the necessity of litigating the title with the trespasser, but where the entry was peaceable the right to a summary remedy is not so clear. Ejectment will always lie against a trespasser, and the earlier cases all hold that where a party is in peaceable possession the owner must resort to this form of action.³⁸ But of late years the tendency has been to extend the scope of the action of forcible entry and detainer and to permit recoveries from trespassers upon a simple showing of prior possession. The question is one of doubt, however, and in many states seems to be obscure and unsettled.

A mere intruder, who relies upon possession only, has but little standing in a court of law when sued in ejectment and a recovery will generally be allowed on a simple showing of the prior possession of the plaintiff.³⁹

³⁶ 5 Rich. II, c. 7.

³⁷ *Judy v. Citizen*, 101 Ind. 18; *Spiers v. Duane*, 54 Cal. 176; *Rawson v. Putnam*, 128 Mass. 552.

³⁸ *Shoudy v. School Directors*, 32 Ill. 290.

³⁹ *Hentig v. Pipher*, 58 Kan. 788, 51 Pac. Rep. 229; *John Henry Shoe Co. v. Williamson*, 64 Ark. 100, 40 S. W. Rep. 703; *Cook v. Bertram*, 86 Mich. 359.

II. SPECIAL CLASSES OF PARTIES.

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| § 114. Heirs and devisees.
115. Reversioners.
116. Continued—Forfeitures.
117. Assignee of reversion.
118. Reversioners by possibility.
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120. Cotenants — Suits between. | § 121. Continued — Extent of recovery.
122. Cotenants and strangers.
123. Continued — Extent of recovery.
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§ 114. **Heirs and Devisees.**—While the rule is well established that heirs, devisees and legatees cannot sue in their own names for the recovery of personal property of a decedent, pending administration or distribution in probate, yet with respect to realty there seems to be a conflict of opinion. It is observable, however, that this apparent conflict rests largely upon the interpretation of local statutes rather than upon any of the recognized principles governing this branch of the law, for usually, where the statute does not give to the personal representatives the possession of the decedent's lands, the heir can maintain ejectment to recover the possession of same at any time after the ancestor's death and before the estate is distributed.⁴⁰ This follows as a logical result of the application of the principle that, upon the death of the ancestor, intestate, his real property vests immediately in his legal heirs, subject only to the right of the personal representative to sell same for the payment of debts, in the manner prescribed by law. The same principle applies to a devisee, where the devise vests an immediate estate in possession.

The statutes and civil codes of some of the states, however, have abolished many of the distinctions of the common law with respect to the real and personal property of decedents, and both are equally permitted to remain as assets in the hands of the executor or administrator pending final settlement. Where such a rule prevails, as where the personal representa-

⁴⁰ *Ubrick v. Beck*, 13 Pa. St. 45; *Murdock v. Mitchell*, 30 Ga. 639; *Warren v. Tobey*, 32 Mich. 74; *Root v. McFerrin*, 37 Miss. 17.

tive is directed by statute to take into his possession all the estate of the decedent, real as well as personal, it follows that the heir at law cannot bring ejectment to recover lands owned by the ancestor while there is an administrator of such estate duly appointed or while the administration of the estate is incomplete or unsettled. During the period of administration, and while the estate is in process of settlement, the right of the heir is subordinate to the administrator's possession.⁴¹ It has been held, however, under statutes similar to those under consideration, that the possession thus given to the administrator is for the joint benefit of creditors and heirs, and should be exercised only as the exigencies of the case may require; that if there is no administration the heirs may maintain ejectment for the lands of the intestate,⁴² and that if there is an administrator, and he declines to commence the action, the heirs have such an estate in possession of the inheritance as will enable them to maintain the suit notwithstanding the power given to the administrator.⁴³

Where the administrator's right of possession is not exclusive, an heir may, even during the pendency of the administration, maintain ejectment against any person except the administrator or one holding under him.⁴⁴

§ 115. **Reversioners.**—While the modern action of ejectment, or statutory substitute, is now employed for the settlement of titles rather than for the mere recovery of possession, which follows as a necessary incident, yet its essence is still that of a possessory action and the pleadings, proofs and judgment are in consonance with this idea. Hence, the right to the ultimate title does not, of itself, insure a recovery unless to it there is also added the right of present possession. In other words, the claimant must have a right of entry upon the lands at the time of the demise laid in the declaration, or at the time

⁴¹ See *Doyle v. Wade*, 23 Fla. 90; *Union Bank v. Powell's Heirs*, 3 Fla. 175; *Harper v. Strutz*, 53 Cal. 655; *Lewon v. Heath*, 53 Neb. 707.

⁴² *Updegraff v. Trask*, 18 Cal. 458; *Bufford v. Holliman*, 10 Tex. 564.

⁴³ *Gossage v. Crown Point, etc. Co.*, 14 Nev. 153.

⁴⁴ *Lewon v. Heath*, 53 Neb. 707; *Jones v. Billstein*, 28 Wis. 221; *Filbey v. Carrier*, 45 Wis. 469; *Holbrook v. Campau*, 22 Mich. 288.

suit is commenced, and whatever takes away this right of entry or possession will also deprive him of his remedy by this form of action, notwithstanding the legal title remains in him.⁴⁵ This rule still obtains in all its pristine vigor, unaffected by time or the mutations through which the action has passed, and is of controlling efficacy whenever invoked.

For this reason a landowner who has created an intermediate estate and duly installed a grantee into its enjoyment, will have no rights either against his grantee, or any person who may have invaded the possession of such grantee, until the determination of such precedent estate.⁴⁶ Thus, a lessor cannot recover the demised premises during the existence of the term or while the lessee has the right of possession under the lease, even against one not claiming thereunder;⁴⁷ and such lease may be shown in evidence by a defendant in ejectment, though he does not connect himself with it, thereby defeating a recovery.⁴⁸

Nor is the integrity of the rule affected even though the defendant may have entered under the tenant of the particular estate and by his consent. The fact that such tenant may have undertaken to convey the whole property, while it indicates an intention upon the part of his grantee to take and hold the land under a claim to the whole thereof in fee, does not confer any right of possession upon the reversioner, nor entitle him to maintain any action to the maintenance of which a right of possession is essential.⁴⁹ It may be that such a conveyance would entitle the reversioner to a forfeiture of the tenant's estate, and, in a proper case, such forfeiture might be made effective by ejectment, but unless the person entitled to the forfeiture elects to enforce it, notwithstanding the existence of a cause of forfeiture, no right of possession will accrue.⁵⁰

§ 116. **Continued—Forfeiture.**—The question of forfeiture raised in the foregoing paragraph is forcibly presented

⁴⁵ *Richardson v. Railway Co.*, 89 Md. 126; *Wells v. Steckelberg*, 52 Neb. 597.

⁴⁶ *Robinson v. Kime*, 70 N. Y. 147; *Pendley v. Madison*, 83 Ala. 484.

⁴⁷ *Cobb v. Lavalle*, 89 Ill. 331.

⁴⁸ *Cobb v. Lavalle*, 89 Ill. 331.

⁴⁹ *Pendley v. Madison*, 83 Ala. 484.

⁵⁰ *Miller v. Ewing*, 6 Cush. (Mass.) 34.

where the tenant in possession is guilty of waste. The general rule of the common law is, that voluntary waste works a forfeiture of estate and is a determination of the tenancy,⁵¹ although the authorities are not altogether clear as to what will constitute waste producing this effect. The felling of timber, opening of mines, changing the course of husbandry, tearing down buildings, etc., are given as examples in the elementary books, but much depends on local custom, the situation of the property, and the circumstances of the particular case. It has been held that if the tenant in possession does any act that works a disherison, as by destroying timber which he cannot reproduce, or removing soil which he cannot replace, the reversion is thereby wasted and an action lies to recover the lands,⁵² but the later cases seem to hold that the mere fact that the tenant is committing waste will not of itself, give to the reversioner any possessory rights. For any injury to the inheritance he may resort to his remedy for waste or such preventive remedy as the law may afford, but cannot bring ejectment so long as the tenancy continues.⁵³

At common law a life tenant by curtesy or dower was always liable in damages to the reversioner for waste committed, and the estate was subject to forfeiture for this reason. By statute the same rule was made to apply to other life tenants. To some extent, not very clearly defined, this rule has been asserted in the United States, but courts hesitate to enforce it and the subject is involved in much doubt. It has been held, in states where the rule still continues to receive some recognition, that a reversioner or remainderman is not entitled to claim immediate possession as a result of the forfeiture of the interest of the life tenant unless it appears that there has been both permissive and voluntary waste by the tenant, or by one for whose conduct he is responsible, and in such case it must further appear that the voluntary waste was committed wantonly and with a reckless disregard of the rights of the next taker.⁵⁴

⁵¹ Phillips v. Covert, 7 Johns. (N. Y.) 1.

⁵² Schermerhorn v. Buell, 4 Denio (N. Y.), 422.

⁵³ Robinson v. Kime, 70 N. Y. 147.

⁵⁴ Roby v. Newton (Ga. 1905), 49 S. E. 694. In this case the

§ 117. **Assignee of reversion.**—By the common law, no one could take advantage of a condition but the immediate grantor or his heirs, a principle fully consistent with the old feudal maxims, but highly injurious to the rights of grantors when the practice of alienating estates had become general and leases for years a valuable possession. To remedy this evil a statute was passed⁵⁵ giving the grantee or assignee of a reversion the same rights and advantages, with respect to forfeitures of estates, as were accorded to the heirs of individuals and the successors of corporations. This statute, as originally enacted, was very broad in its terms, permitting to the assignee a privilege of re-entry not only for non-payment of rent or waste but for “other forfeiture.” But the courts, in their interpretation of the statute, limited its effect by declaring that the “other forfeiture” extended only to matters of the same nature as those expressly named and which were incident to the reversion or for the benefit of the estate. Thus, the assignee might take advantage of covenants relating to repairs or the course of hus-

court says: “The feudal system, which furnished the reasons for the common-law rule that a dowress was liable in damages for waste, and which brought about the statutes applying the same rule to other tenants for life, and imposing harsh penalties not known to the common law, never having been of force in this state, the harsh and stringent rules applied in some English cases in determining what was waste are not, and never were, suited to the conditions of our people, and therefore never became a part of our law. Therefore our law determines the question as to what is waste by looking alone at the rights of two individuals, one in possession of the estate for a limited time, and the other who is to take after the lapse of that time, without regard to any system of tenures of which the estate in

question formed a component part. In England the courts were bound to look, not only to the rights of the individuals who were owners of the estate, but also to the rights of the lord paramount under the system which public policy demanded should be maintained. Therefore under our law the tenant for life must not be harassed and disturbed by the interference of the reversioners or remainderman, unless it be clearly shown that the rights of the latter as the ultimate owner of the property are imperiled by the conduct of the tenant. Dower is favored by the law, and a tenant in dower, of all other tenants, is entitled to the enjoyment of her estate free from the undue espionage and intermeddling of the heirs of her husband or those who claim under them.”

⁵⁵ 32 Hen. VIII, 34.

bandry, but not of collateral covenants, and this construction was generally followed by the courts of this country.

In the absence of a statute to the contrary the old rule will probably control in the settlement of questions in which it may be invoked, but such statutes now exist in many states and under them, where a reversion is conveyed before the breach of any express condition annexed to the particular estate, the assignee of the reversion has the same right of entry and the same remedy for breach of the condition as the original grantor, or those who legally represent him, would have had if the reversion had not been so conveyed.⁵⁶

§ 118. **Reversioners by possibility.**—A reversion is a vested interest, the residue of an estate left in a grantor after he has carved out a particular estate, but which commences in possession only after the determination of the precedent estate thus created. There are many cases, however, where property may revert to a grantor who has parted with all his estate, as where land is dedicated in fee for a special purpose, and the purpose fails, or where a conveyance has been made to a corporation which is subsequently dissolved by ouster, and, generally, where the entire interest is conveyed but its continuance depends upon a contingency.⁵⁷ As there is no such thing in law as a contingent reversion,⁵⁸ it follows that about all that is left in the grantor, in a case of this kind, is a naked possibility of reverter. This is not an estate of any kind recognized by the law, and hence, as no rights can be predicated upon it, ejectment will not lie for the lands affected by it.⁵⁹

The question arises mainly in those cases where rival titles are asserted by parties claiming under the grantor by deed or will on the one hand and by inheritance on the other. It seems

⁵⁶ Consult local statutes.

⁵⁷ *Board of Education v. Edson*, 18 Ohio St. 221.

⁵⁸ This statement may cause some doubt, from the fact that both courts and legal writers have, in many instances, used the term in the discussion of legal propositions. Such use, however, can be regarded only

as a sort of convenient colloquialism. No such an estate is known to the law and the improper use of the term seems to have grown out of misapplications of the doctrine of remainders.

⁵⁹ *Davis v. Railway Co.*, 87 Ala. 633, 6 So. Rep. 140.

clear, however, that a mere possibility of reverter cannot be made a subject for disposition by deed or will; in other words, it is incapable of either alienation or devise.⁶⁰ If, by any chance, the grant should fail the grantor becomes clothed with a right of entry and this right he may assert by an action of ejectment against the party in possession. But the right, so far as it may be called a right, is strictly personal until the occasion arises for its exercise, that is, until there has been a breach of condition or other circumstance permitting an entry. If, prior to this event, the grantor attempts to convey the land, his grantee takes nothing, nor will a devisee acquire any right by an attempted disposition by will. In the event that the grantor dies before a right of entry accrues his heirs succeed to his reversionary rights, and may maintain ejectment against any person in possession claiming under him.⁶¹ This is only a restatement of the old and oft repeated rule, that where an estate is conveyed upon a condition subsequent no one can take advantage of the breach of such condition except the grantor or his heirs.⁶²

§ 119. **Remaindermen.**—The questions discussed in the paragraphs immediately preceding and the rules therein stated, apply in many respects to remaindermen. As it is indispensable to the maintenance of the action that the plaintiff shall have a right of possession at the time suit is instituted, it necessarily follows that a remainderman cannot avail himself of the remedy during the continuance of the particular intermediate estate.⁶³ For any act done or threatened, which constitutes an injury to the inheritance, he is entitled to a remedy, either preventive or compensatory, but, notwithstanding there may have been a total disseizin of the tenant of the particular estate by a stranger to the title, or that such tenant has assumed to convey the entire property, and has placed his grantee in full

⁶⁰ *Presbyterian Church v. Venable*, 159 Ill. 215; *Nicoll v. Railroad Co.*, 12 N. Y. 121.

⁶¹ *Presbyterian Church v. Venable*, 159 Ill. 215.

⁶² *Towne v. Bowers*, 81 Mo. 491; *Merritt v. Harris*, 102 Mass.

328; *Hooper v. Cummings*, 45 Me. 359.

⁶³ *Cook v. Caswell*, 81 Tex. 678; *Miller v. Ewing*, 6 Cush. (Mass.) 34; *Salmons v. Davis*, 29 Mo. 176; *Wells v. Steckelberg*, 52 Neb. 597.

possession, in neither case would the remainderman be entitled to maintain an action for the recovery of the land until the termination of the particular estate.⁶⁴ This logically follows from the reason that the injury in either case is only to the possession, and as the remainderman has no right of possession, therefore he can suffer no injury from the detention of possession by another.

On the other hand, when the particular precedent estate has terminated, and a right of entry has accrued, the remainderman may at once institute an action for the recovery of the land if possession thereof shall be withheld.⁶⁵

§ 120. **Cotenants—Suits between.**—It was announced at an early day, both in England and America, that one tenant in common cannot, in general, maintain an action of ejectment against his cotenant unless there has been an actual ouster,⁶⁶ and this doctrine, in its essential terms, continues to find expression.⁶⁷ For some time, however, considerable uncertainty seems to have prevailed with respect to the meaning of the words "actual ouster." It would seem that at one time they were held to indicate some act or acts accompanied by physical force, but this meaning was subsequently repudiated and the question as to whether one tenant had actually ousted another was held to be one of fact, involving the intentions and motives of the party in possession to be inferred from circumstances.⁶⁸ Where one tenant denies the title of the other and claims the whole property,⁶⁹ or where one hinders the entry of the other,⁷⁰ this will amount to an ouster and give to the injured party a right to recover his moiety in ejectment.⁷¹ It would seem nec-

⁶⁴ *Pendley v. Madison*, 83 Ala. 484; *Salmons v. Davis*, 29 Mo. 176; *Pierre v. Fernald*, 26 Me. 440; *Foster v. Marshall*, 22 N. H. 491.

⁶⁵ *Davis v. Jones*, 95 Ga. 788, 23 S. E. Rep. 79.

⁶⁶ *Barnitz's Lessee v. Casey*, 7 Cranch (U. S.), 456; *Clapp v. Bromagham*, 9 Cow. (N. Y.) 556.

⁶⁷ *Vance v. Schroyer*, 77 Ind.

501; *Edwards v. Bishop*, 4 N. Y. 61.

⁶⁸ *Cummings v. Wyman*, 10 Mass. 468.

⁶⁹ *Edwards v. Bishop*, 4 N. Y. 61.

⁷⁰ *Gordon v. Pearson*, 1 Mass. 323; *Norris v. Sullivan*, 47 Conn. 474.

⁷¹ *Gale v. Hines*, 17 Fla. 773; *Frakes v. Elliott*, 102 Ind. 47; *Falconer v. Roberts*, 88 Mo. 574.

essary, however, that there should be an ouster of some kind to enable one tenant to bring the action against his cotenant and where this right has been preserved by statute, as is generally the case, the statute, as a rule, continues to employ the ancient formula providing for an "actual ouster." But while the form has been retained and an ouster must still be alleged and proved,⁷² a forcible expulsion is no longer required to be shown and it will be sufficient if the plaintiff proves any act which amounts to a total denial of his claim.⁷³ The denial must be such as to amount to a disseizin of the cotenant, or such as will establish an adverse possession upon the part of the wrongdoer.⁷⁴ That is, it must be more than a mere claim in fee, for such a claim is consistent with the title; it must be a claim of exclusive ownership. Nor is a refusal to pay rents and profits to a cotenant sufficient to furnish grounds for the action unless there is also a denial of his title.⁷⁵ Neither will ejectment lie at the instance of one tenant in common merely because his cotenant is occupying more land than would be his share of the premises upon a division thereof.⁷⁶

If the defendant by his pleadings admits an ouster or sets up a claim to the entire premises as of right, the fact of ouster will be taken as established without any proof on the part of the plaintiff.⁷⁷

§ 121. Continued—Extent of recovery.—But while it is now well settled that one tenant in common may maintain ejectment against a cotenant in possession who disputes his rights,⁷⁸ yet such action can be brought only for the moiety or undivided share of such tenant and not for possession of the entire tract

⁷² *Ewald v. Corbett*, 32 Cal. 499; *Higbee v. Rice*, 5 Mass. 351; *Cross v. Robinson*, 21 Conn. 385; *Allen v. Long*, 80 Tex. 261; *Edwards v. Bishop*, 4 N. Y. 61.

⁷³ *Phelan v. Smith*, 100 Cal. 158; *Minton v. Steele*, 125 Mo. 181; *Cameron v. Railway Co.*, 60 Minn. 100; *Norris v. Sullivan*, 47 Conn. 474; *Edwards v. Bishop*, 4 N. Y. 61.

⁷⁴ *Clapp v. Bromagham*, 9 Cow. (N. Y.) 556.

⁷⁵ *Siglar v. Van Ripper*, 10 Wend. (N. Y.) 415.

⁷⁶ *Daniel v. Daniel*, 102 Ga. 181.

⁷⁷ *Harrison v. Taylor*, 33 Mo. 211; *Allen v. Salinger*, 103 N. C. 14; *Noble v. McFarland*, 51 Ill. 229.

⁷⁸ *Mable v. Whitaker*, 10 Wash. 656.

nor for a designated part of the land.⁷⁹ At first blush this appears incongruous, as it seems to imply a divided possession. There is no technical difficulty, however, in the enforcement of a judgment recovered in an action so brought and the plaintiff having been found to be the owner of an undivided interest may properly be let into possession with the defendant according to their respective interests.⁸⁰

§ 122. **Cotenants and strangers.**—As a general proposition any two or more persons, claiming the same land as cotenants, may join in an action for its recovery or any one may sue alone for his share. This is the statutory rule of most of the states and where the rule obtains the action may still be maintained notwithstanding that the interests of the tenants are unequal. Upon the foregoing proposition there does not seem to be any dispute.⁸¹

But with respect to the right of one tenant, acting solely for himself, to recover the entire property, there is much conflict of opinion. Inasmuch as a tenant in common is entitled to the possession of the entire tract, as against all persons except his cotenant, it would seem to be in consonance with legal reason that he may, without joining such cotenant, maintain an action of ejectment against a stranger and recover possession of the whole thereof. This view has been adopted in a number of states, and in those states now constitutes a settled rule.⁸² The reason for the rule certainly seems ample to sustain it, particularly when we consider that the gist of ejectment is the recovery of possession rather than the establishment of title, and that the question of title is raised only incidentally for the purpose of sustaining such right to recover. In trespass the prin-

⁷⁹ *Duncan v. Rodecker*, 90 Wis. 1.

⁸⁰ *Foster v. Hackett*, 112 N. C. 546.

⁸¹ *West Chicago Park Commissioners v. Coleman*, 108 Ill. 591; *Baber v. Henderson*, 156 Mo. 566; *Telfener v. Dillard*, 70 Tex. 139; *King v. Hyatt*, 51 Kan. 504; *Marshall v. Palmer*, 91 Va. 344.

⁸² *Mather v. Dunn*, 11 S. Dak. 196; *Newman v. Bank*, 80 Cal. 368; *Allen v. Higgins*, 9 Wash. 446; *Grassmeyer v. Beeson*, 18 Tex. 766; *Sowers v. Peterson*, 59 Tex. 216; *Thames v. Jones*, 97 N. C. 121; *Smith v. Tankersley*, 20 Ala. 272; *Robinson v. Roberts*, 31 Conn. 145.

ciple involved has never been questioned,⁸³ and, as the possessory rights are the same in both actions, there seems no substantial reason why it should not obtain in ejectment. Whatever objection might be urged against it with respect to the now infrequent estate of joint-tenancy does not apply to tenants in common. Such latter persons are not united in interest, and hence escape the rule requiring joinder of parties, while the possession of one is the possession of all, and for these reasons there is nothing incongruous or inconsistent in an action by one of them to recover from a stranger the possession of the common property. As the action is now conducted in all of the states it is sufficient for the plaintiff in ejectment, upon the trial, to show a right in himself to the possession of the premises at the time of the commencement of the suit, and this a tenant in common certainly does when he discloses his title, notwithstanding that such proof may also show that another has substantial interests in the land.

§ 123. **Continued—Extent of recovery.**—It is contended, and with much reason, that whenever a right is given there should be a corresponding remedy for its protection and enforcement,⁸⁴ and as there can be no dissent from the fundamental proposition that each cotenant is, as against a stranger, entitled to the exclusive possession of all of the common property, there would seem to be but one logical conclusion to be drawn when that possession has been invaded by a stranger. In such event either tenant should be free to vindicate the right to possession and to employ any of the agencies which the law has provided for such an emergency. Hence, a cotenant should have the right to recover possession by an action of ejectment in his own name irrespective of the extent of his estate or actual interest in the land.⁸⁵

⁸³ *Hibbard v. Foster*, 24 Vt. 542.

⁸⁴ *Freeman, Cotenancy*, sec. 343.

⁸⁵ The doctrine of the text is supported by the following authorities: *Robinson v. Roberts*, 31 Conn. 145; *Sharon v. Davidson*, 4 Nev. 419; *Sherin v. Lar-*

son, 28 Minn. 523; *George v. McGovern*, 83 Wis. 555; *Allen v. Higgins*, 9 Wash. 446; *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. 771; *Hibbard v. Foster*, 24 Vt. 546; *Newman v. Bank*, 80 Cal. 368; *Telfener v. Dillard*, 70 Tex. 139.

It has sometimes been urged, in opposition to this view, that if the owner of an undivided interest be allowed to recover the whole property he will, on the strength of a title to a moiety, have recovered possession of other moieties to which he has no title, and, having so obtained possession of the entire property, will not be estopped from denying the title of the owner of the other interest.⁸⁶ There is some support for this view in a case where there is no community of interest between the claimant and the other owners and where each holds under different titles. In such event, as the recovery is not based upon a common title, if the claimant does not recognize or mention the title of his cotenants there would, perhaps, be no impropriety in restricting his recovery to the actual interest he is able to show. But where the tenant grounds his claim to recover on the common title, he recovers, if at all, for the benefit of the whole, and if in such action he obtains possession of the land, his cotenants become likewise possessed.⁸⁷ In such a case, notwithstanding the action was brought in the name of one, the recovery would be for the benefit of all. Where the right to sue in this manner is recognized, however, the courts go much farther and permit recoveries of the whole to a sole claimant of any undivided part on the theory that where one tenant in common of lands recovers possession of the same, as against a mere disseizor, his recovery inures to the benefit of all of the cotenants and the judgment he may obtain will be subordinate to their rights.⁸⁸

§ 124. Continued—Opposing views.—But while there are numerous precedents to support the doctrine just enunciated the volume of authority is in opposition to it, and the more generally observed rule would seem to be, that in ejectment by a tenant in common against a person in possession, who is a stranger to the title, the plaintiff can recover only to the extent of his interest.⁸⁹ This rule proceeds upon the well recognized principle of the action that a plaintiff must recover if at all, on the strength of his own title, and hence, as a necessary corol-

⁸⁶ *King v. Hyatt*, 51 Kan. 504, Neb. 505; *Newman v. Bank*, 80 Cal. 368.

⁸⁷ *Barrett v. French*, 1 Conn. 364.

⁸⁸ *Mattis v. Boggs*, 19 Neb. 698; *Kirk v. Bowling*, 20 Neb. 260; *King v. Hyatt*, 51 Kan. 504;

⁸⁹ *Crook v. Vandervoort*, 13

lary, his recovery must be in accordance with that title.⁹⁰ The old rule whereby a plaintiff was required to state in his pleading the exact nature of the interest he claimed and was restricted in his proof to the estate actually declared upon, has been so far relaxed as to permit him to sue for the whole of the premises and to recover such part, or such interest therein, as upon the trial he shall show himself lawfully entitled to. But this seems to be its full extent, and while he may prove and recover such interest the authorities which announce the rule now under discussion seem to be united upon the point that he cannot, in his own name, represent or bind his cotenants nor recover any other or greater interest than his evidence shall show him to be entitled to.⁹¹ Hence, each tenant who may be ousted by a stranger must sue for and can recover only his aliquot part or share of the estate, which part or moiety so recovered he will hold in common with the disseizor, until his remaining cotenants institute like proceedings as himself to recover from the stranger his or their individual interests in the land.⁹²

Further, while any person may bring ejectment for the whole of the premises, and his action will not be defeated merely because he fails to prove that he is entitled to the entirety, and shows only a title to some lesser interest, yet it is incumbent upon him not only to establish the legal title in himself to such lesser interest, but also to prove the extent of such interest. If it appears that there are other persons interested with him as cotenants, he must show the specific share or proportion that belongs to him, and his undivided interest must be made certain, clear and definite. If he fails to do this, and, as a consequence, his interest cannot be specified by the verdict of the jury or the judgment of the court, he cannot recover, and judgment will be rendered for the defendant.⁹³

Gray v. Givens, 26 Mo. 303; Dawson v. Mills, 32 Pa. St. 302; Overcash v. Ritchie, 89 N. C. 384; Marshall v. Palmer, 91 Va. 344; Cruger v. McLaury, 41 N. Y. 219.

⁹⁰ Mobley v. Bruner, 59 Pa. St. 483; Johnson v. Hardy, 43 Neb. 368. In this case the plaintiff was permitted to amend by making his cotenant a party.

⁹¹ Marshall v. Palmer, 91 Va.

344; Gray v. Givens, 26 Mo. 291; King v. Hyatt, 51 Kan. 504; Johnson v. Hardy, 43 Neb. 368.

⁹² Baber v. Henderson, 156 Mo. 566, 57 S. W. Rep. 719; Dewey v. Brown, 2 Pick. (Mass.) 387; Mobley v. Bruner, 59 Pa. St. 483. And see Kirk v. Bowling, 26 Neb. 260.

⁹³ Marshall v. Palmer, 91 Va. 344.

§ 125. **Doweress.**—In many of the states a widow may bring an action of ejectment to recover unassigned dower in the lands of her late husband, while in some states it can be recovered only in this form of action.⁹⁴ At common law an ejectment for dower would not lie before assignment, and the only remedy, in such a case, was the old writ of dower, but in the United States, from an early day, ejectment has been permitted by statute before assignment or admeasurement,⁹⁵ and where the old statutory action of ejectment is still permitted it will generally lie for unassigned dower, although, in such event, it is regarded simply as a right of action and not a vested interest.⁹⁶

Usually, an assignee of a chose in action may sue and recover thereon, either in his own name or in the name of the assignor, and it has been held in some states that if a widow sells her right of dower before assignment the purchaser may pursue an appropriate remedy and compel an assignment.⁹⁷ But, in the absence of express statutory authority to the contrary, the better considered rule would seem to be that the right is personal to the doweress, and that unassigned dower can be recovered by no person other than the widow. Where this rule prevails an action of ejectment will not lie at the suit of an assignee, whether prosecuted in his own name or otherwise.⁹⁸

An action of ejectment for dower is now very infrequent and in a majority of the states is not permitted. The early statutes of ejectment, which followed the lead of the Revised Statutes of New York, generally provided for this form of recovery, but during later years the inconvenience of the method has led to its general abolition and in only a few states is it now pursued.

§ 126. **Tenant by courtesy.**—Under modern statutes the estate by curtesy has well nigh been obliterated. In some states

⁹⁴ *Proctor v. Bigelow*, 38 Mich. 285.

⁹⁵ The change seems to have been first effected in New York, and the policy thus inaugurated has been followed in a number of states.

⁹⁶ *Yates v. Paddock*, 10 Wend. (N. Y.) 529.

⁹⁷ *Roble v. Flanders*, 33 N. H. 524; *Rowe v. Johnson*, 19 Me. 146; *Thomas v. Simpson*, 3 Pa. St. 60.

⁹⁸ *Galbraith v. Fleming*, 60 Mich. 408.

it is not recognized at all ; in others it obtains but a scant recognition ; in no state is it allowed its full common-law significance. It has been held, in those states where the estate continues to exist, that a tenant by the curtesy initiate may sue alone for possession of his wife's land and for damages for the detention thereof.⁹⁹ This is the common-law rule, but even where the estate is recognized it is practically rendered nugatory by enactments which give to a married woman the same rights of control over her separate property that she would have if she were sole.

III. HUSBANDS AND WIVES.

§ 127. Generally considered.	§ 130. Married women — Defendants.
128. Married women—Plaintiffs.	131. Joinder of wives.
129. Suits against the husband.	132. Homesteads.

§ 127. **Generally considered.**—In the old law the topic discussed in this section had but a small place, the possessory rights of the wife, for most purposes, being transferred to the husband. Indeed, the old writers on ejectment do not notice the marital relation, except as it serves to confer rights on the husband, and then only in a casual and incidental way. But modern legislation has completely changed the marriage *status*, so far as it affects the ownership of land and the assertion of possessory rights therein, and the topic becomes of much importance in every work assuming to treat of the trial of contested titles.

§ 128. **Married women—Plaintiffs.**—By the rules of the common law the legal existence of a woman, upon her marriage, became suspended, and thenceforward, during the coverture, was merged entirely in that of the husband. As a consequence she was without capacity to take or hold real property or make any valid contracts with respect to same. The husband, by virtue of the marital relation, was alone entitled to the possession of the wife's lands during their joint lives, and as

⁹⁹ *Wilson v. Arentz*, 70 N. C. 670.

the right of possession is the indispensable requisite for the maintenance of ejectment, it followed that the wife was without capacity to sue for the recovery of her lands and that the possessory title of the husband was sufficient to enable him to bring the action in his own name.¹ In those states where a husband is entitled to the possession of his wife's land he may still sue in ejectment therefor without joining her in the action.²

But, at the present time, for nearly every practical purpose, a married woman rests under no disability from the simple fact of coverture, and, in most of the states, broad and comprehensive statutes secure to her the same freedom of action as though she was sole. Under these statutes married women have the same rights in their separate estates as are possessed by their husbands in respect of their own property, including the right to bring an action to recover possession of lands from which they have been unlawfully ousted.³ Nor is it necessary, in cases of this kind, that the husband be joined as a plaintiff.⁴ This is a wide departure from the ancient rules with respect to suits by married women, and while the husband may, perhaps, still properly join in a suit for the recovery of the wife's lands, as prescribed by Chitty and the earlier writers, yet, under modern statutes which give to a married woman the right to take, hold and convey property with like effect as if she were unmarried, it is clear that the husband is not a necessary party.

§ 129. **Suits against the husband.**—It does not appear to be material to the operation of the principle involved in the statute mentioned in the preceding paragraph, or the exercise of rights thereunder, whether the disseizor be a stranger or the husband of the plaintiff. Where the doctrine of absolute property in a married woman is recognized and enforced it has repeatedly been held that she may maintain an action of ejectment against her husband to recover possession of lands to

¹ *Jackson v. Leek*, 19 Wend. (N. Y.) 339; *Chambers v. Handley*, 3 J. J. Marsh. (Ky.) 98; *Shaw v. Hersley*, 5 Mass. 521; *Thornton v. Thornton*, 3 Rand. (Va.) 179.

² *Evans v. Kunze*, 128 Mo. 670.

³ *Darby v. Callaghan*, 16 N. Y. 71; *Cook v. Cook*, 125 Ala. 583, 27 So. 918.

⁴ *Darby v. Callaghan*, 16 N. Y. 71.

which she is entitled in her own right.⁵ Nor is it of any consequence, in such event, that the land of which recovery is sought has been occupied by the husband and wife and their children as a homestead, nor that the husband and children continue to reside thereon.⁶ In some of the cases the right to maintain the action is restricted to parties living separate and apart from each other,⁷ and in most of the cases where the doctrine, as above stated, has been announced this has been their condition.

This is another wide departure from the common law, under which the disabilities of coverture effectually precluded a wife from suing her husband at law, and by which such coverture might always be pleaded in bar of the action. But it is contended, and with much legal reason, that legislative acts giving to a married woman the same *status* and rights as though she were sole so far as respects her own separate property, would have no very beneficial operation or effect in the protection of such property unless the powers conferred should be made to extend to the prosecution of suits for its recovery even against her husband, should he, contrary to her wishes and in defiance of her rights, unlawfully interfere with it.⁸ The decisions in which this doctrine is announced proceed, in the main, upon the theory that legislation extending the contractual powers of married women has destroyed the common-law unity in person of husband and wife, so far at least as their rights of property are concerned, and has given to each spouse a separate and independent legal existence to such an extent as may be necessary to the full exercise and protection of such rights.⁹ Where this doctrine prevails the wife may, in her own name and in any form of action, sue the husband to enforce any right affecting her property, the same as if he were a stranger.

⁵ Wood v. Wood, 83 N. Y. 575; Crater v. Crater, 118 Ind. 521; McKendry v. McKendry, 131 Pa. St. 24, 6 L. R. A. 506; Buckingham v. Buckingham, 81 Mich. 89; Cook v. Cook, 125 Ala. 583, 27 So. Rep. 918, 82 Am. St. 264.
⁶ Cook v. Cook, 125 Ala. 583, 27 So. Rep. 918, 82 Am. St. 264. But see Manning v. Manning, 79 N. C. 293.
⁷ McKendry v. McKendry, 131 Pa. St. 24. And see Taylor v. Taylor, 112 N. C. 134.
⁸ Emerson v. Clayton, 32 Ill. 498; Smith v. Smith, 20 R. I. 556.
⁹ See Sims v. Rickets, 35 Ind. 181; Wright v. Wright, 54 N. Y. 437; Gillespie v. Gillespie, 64 Minn. 381.

But while the legislation upon this subject has been comparatively uniform throughout the country the judicial construction of such legislation has been variant and contradictory. It is believed that the foregoing statements represent not only the preponderance of authority but the general trend of public sentiment as well, yet, in many states, where statutes have been enacted giving to a wife the power to contract and sue generally, it is contended that such statutes do not extend to contracts made with the husband or to suits brought against him during the coverture, and, in such states, while the old common-law right to sue in equity is still recognized, the right to bring an action at law is denied. The statute, in such states, is permitted to have only a limited effect. That is, the wife may sue or be sued without joining the husband, but with respect to the spouses the legal unity remains unaffected, and, as a consequence, neither may maintain a legal action against the other.¹⁰

In a few states the statute expressly decides the question, either by an express inhibition of the right to sue the husband,¹¹ or an express permission so to do,¹² and, in such cases, the decisions thereunder are practically of no value for juristic purposes or as persuasive authority in other states.

There is another feature of the subject which is reserved for discussion in another place, and that is: to what extent a judgment of ejectment may be executed against the husband. As a rule, the sheriff must evict the defendant where a writ of possession is sued out by the successful plaintiff, and the application of this rule, in the case of husband and wife, is fraught with much difficulty.

§ 130. **Married women—Defendants.**—Where a married woman is in the joint occupancy of land with her husband, asserting and claiming an interest therein in her own right, she is not only a proper but a necessary party and a recovery against the husband alone will not affect her rights.¹³ Where

¹⁰ See *Barton v. Barton*, 32 Md. 214; *Smith v. Gorman*, 41 Me. 405; *Small v. Small*, 129 Pa. St. 366.

¹¹ This is the case in Massa-

chusetts. See *Lombard v. Morse*, 155 Mass. 136.

¹² As in California. See *Wilson v. Wilson*, 36 Cal. 447.

¹³ *Stewart v. Patrick*, 68 N. Y. 450.

such title is of record no question can arise, but where the claim rests on mere occupancy and the statute of limitations, the case becomes one of difficulty.

As a general proposition a married woman is presumed to have entered under her husband and their joint occupancy is, in law, the possession of the husband.¹⁴ In the absence of evidence upon the subject the legal presumption supplies the want of proof and becomes conclusive. But the presumption may always be rebutted by showing that she took possession in her own right, and when a married woman enters into the possession of land in her own right, claiming under a color of title emanating from a source other than her husband, and continues uninterruptedly in possession, claiming the land as her own, for the statutory period of limitation, then, notwithstanding her husband may have shared the occupancy with her, her title becomes complete and is not affected by a recovery from the husband in an action to which she was not a party.¹⁵

Where husband and wife are in the joint occupancy of land, the title whereof is vested in the wife, or where the husband alone is in the ostensible possession of such land, some intricate questions may arise out of the statutory directions respecting parties defendant. Thus, the statute directs the action to be brought against the "actual occupant." But if the husband is in possession only as the consort of the wife, or as an agent or servant of the wife, this, it has been held, does not constitute him an occupant within the meaning of the law.¹⁶ It is further held, that the question as to who is the actual occupant in a case of this kind, and hence a proper defendant, is one of fact for the jury; and where the title is in the wife they may properly find that she was the actual occupant, notwithstanding her husband was in charge of affairs, cultivated the soil, etc. These decisions proceed upon the theory that a husband may still be the head of a family without being in any legal sense the possessor or "actual occupant" of the house or land in or upon which the family reside.

¹⁴ *Bledsoe v. Simms*, 53 Mo. 450; *Martin v. Rector*, 101 N. Y. 305. 77.

¹⁵ *Collins v. Lynch*, 157 Pa. St. 246; *Stewart v. Patrick*, 68 N. Y. 77. ¹⁶ *Martin v. Rector*, 101 N. Y. 77.

§ 131. **Joinder of wives.**—It remains now to consider the position sustained by married women with reference only to the marital relation and where no separate proprietary rights are involved. The question as to the joinder of wives will occur only in case of defendants and the rule would seem to be quite general that a wife is not a necessary party to an action for the recovery of lands in the possession of the husband, and in which she holds no separate estate in her own right.¹⁷ A different rule may, perhaps, apply where the husband is under some disability and the wife is in the actual occupation of the land. Thus, where the husband is insane and confined to a lunatic asylum and the possession of the premises is withheld by the wife, in view of the circumstances, the situation of the husband, his enforced absence and confinement, his unfortunate mental condition, and the actual possession of the wife, she must be regarded as a proper, if not a necessary, party defendant.¹⁸

When, however, both spouses are in the actual occupation of land, although under the claim of the husband, and both of them, or the wife alone, refuse to surrender possession when demanded, the wife may become a proper party and may be sued as well as the husband.¹⁹

§ 132. **Homesteads.**—It would seem as though the general rule, that a wife is not a necessary or even a proper party to an action of ejectment for the recovery of lands in the possession of the husband, and in which she has no separate estate, might find an exception where the land in question had been properly impressed with the character of a homestead.

The homestead, however, must rest upon some other valid legal estate and is dependent on the general title of the claimant. The cases must be very few in which considerations of this kind can enter, and, usually, it will not affect the appli-

¹⁷ Bledsoe v. Simms, 53 Mo. 305; Bunce v. Bidwell, 43 Mich. 542.

¹⁸ Bensteck v. Cook, 110 Mo. 173.

¹⁹ So held in ejectment by a vendor to recover possession

from a purchaser in default in the payment of instalments of the purchase money where both spouses were in possession and refused to surrender. Reddish v. Smith, 10 Wash. 178.

cation of the rule as stated, that the property sought to be recovered is claimed as a homestead when the proceeding is based upon a prior alienation by deed or mortgage in which the wife has properly joined.²⁰ The homestead law, as generally enacted, in no way limits the power of husband and wife to alienate their homestead by deed of conveyance with or without conditions, and is intended mainly as a protection from forced sale under execution during the lifetime of the owner and his dependent survivors after his death. The wife of the owner, during his lifetime, has no right of possession that may not be divested by a conveyance in which she joins, and where a valid sale is had under a mortgage or trust deed so executed the purchaser may maintain ejectment without regard to the wife.

But, however we may regard the views just presented, it would seem that where ejectment is brought on an independent title and claim of paramount right, the wife, in case the defendant is a married man, may become a necessary party. While it is true that the action is usually brought to settle conflicting claims of title yet its nature is still possessory. Hence, although the title may in fact be in the husband, yet, if the land is occupied as a homestead such occupancy involves a question of possession, in which the wife is equally interested. Under these circumstances it has been held that the wife is a necessary party in the case and should be made a defendant with the husband.²¹ In like manner, where husband and wife occupy together, as a homestead, lands claimed to belong to the wife, an action of ejectment to test the validity of a conveyance to the wife should be brought against both.²²

²⁰ Conn. Life Ins. Co. v. Jones, 47; Connor v. Nichols, 31 Ill. 148.
1 McCrary (C. Ct.), 388.

²¹ Cleaver v. Bigelow, 61 Mich. ²² Hodson v. Van Fossen, 26 Mich. 68.

IV. MORTGAGORS AND MORTGAGEES.

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| § 133. Generally considered.
134. Relation of the parties.
135. Actions by the mortgagees.
136. Continued—Modifications and denials of mortgagee's rights.
137. Actions by the mortgagor—Against mortgagee.
138. Provisions for possession. | § 139. Accounting and payment.
140. Variances and exception.
141. Debt barred by limitations.
142. Actions by the mortgagor—Against strangers.
143. Equitable mortgages. |
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§ 133. Generally considered.—The earlier writers on ejectment devote much space to that phase of the action which has special reference to the relation subsisting between mortgagor and mortgagee, and the respective rights and duties which spring from such relation in respect to the occupancy and possession of the mortgaged property. With the exception of landlords and tenants no class seems to have furnished a greater amount of litigation in this form of action, and much curious but now comparatively obsolete learning will be found scattered through all of the reports published during the first half of the last century.

It may further be observed that much confusion exists at the present time with respect to the *status* of the parties and the rights which attend such *status*. In many jurisdictions the old doctrines of the relation have been materially changed, modified, or abrogated. In others the notions of the mediaeval lawyers have, to a considerable extent, been retained. Out of this has grown an irreconcilable conflict of judicial opinion and the authorities are variant and contradictory. The chief difficulty lies in the character to be accorded to the mortgage. The old theory is that it is a conveyance; the modern theory is that it is but a lien. In no state is the old doctrine now accepted in its entirety, yet in those states which continue to recognize the technical distinctions of law and equity the ancient idea which regards a mortgage as a substantive conveyance still continues to find a modified expression.

It will readily be seen that where a mortgage is regarded as a conveyance of the fee the rights of the parties, with respect

to the occupancy of the land, will be vastly different from those which arise where it is regarded merely a charge or incumbrance upon the fee. In the latter case the mortgage works no substantial change. The legal title, with all its incidents, remains in the mortgagor subject only to the lien,²³ and such lien, while it holds the mortgaged premises as security for the discharge of the mortgagor's obligation, is not an estate in the land.²⁴

When the action of ejectment was remodeled by the legislature of New York in the early part of the last century, as elsewhere mentioned in this work, it was specifically provided that the action should not thereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the possession of the mortgaged premises,²⁵ and this provision was subsequently adopted by many of the other states.²⁶

§ 134. *Relation of the parties.*—In its original form the execution of a mortgage had the effect to vest in the mortgagee the full legal estate, subject to be defeated only by the performance of the condition annexed to the grant. If tender of payment of the money, to secure which it was given, was not made on the day appointed therefor, according to the condition, the estate became absolute and indefeasible in the mortgagee; and by the strict rules of the common law all interest or right therein of redemption passed from the mortgagor. Equity early interfered to moderate the severity of this rule and to permit redemptions, on the ground that the conveyance was intended merely as a pledge, and the doctrine was promulgated that notwithstanding the forfeiture at law, the breach of the condition was in the nature of a penalty which should be relieved against in equity. This was the law that was introduced

²³ *Brinkman v. Jones*, 44 Wis. 510; *Hubbel v. Moulson*, 53 N. Y. 255; *Vason v. Ball*, 56 Ga. 268; *Wing v. Cooper*, 37 Vt. 169; *Fletcher v. Holmes*, 32 Ind. 497; *Carpenter v. Bowen*, 42 Miss. 28; *Woods v. Hildebrand*, 46 Mo. 284; *McMahon v. Russell*, 17 Fla. 698; *Terrell v. Allison*, 21 Wall. (U. S.) 292.

²⁴ *Mack v. Witzler*, 39 Cal. 247; *Blackwell v. Barnett*, 52 Tex. 326; *Berthold v. Fox*, 13 Minn. 501.

²⁵ Part 3, chap. 5, title I, § 57, R. S. N. Y.

²⁶ See *Malloy v. Malloy*, 35 Neb. 224.

into the colonies, and which, in various modified forms, has continued in some localities until our own time.

But within comparatively recent years the old ideas concerning the relative *status* and rights of the parties have been discarded in many states. The assimilation of law and equity in one form of action is, to a large extent, responsible for this but other causes have contributed, the chief of which perhaps is, that the reciprocal rights and duties of the parties should conform to their real intention when the relation was entered into. That intention, in every instance, is that the mortgaged property is only a security for the payment of a debt, or the discharge of some contractual obligation, and the mortgage but a lien. This view is now confirmed in many states by statute.

In form, a mortgage, as generally drawn, still purports to convey a present legal estate to the mortgagee, with a clause of defeasance on performance of the condition, and in this respect there has been but little change from the old methods; but its legal effect, in most of the states, is only to create a lien on the land which is held to be a security for the payment of the mortgage debt. In the states where this doctrine obtains, the title, with all its incidents, remains in the mortgagor, subject to the lien, and though the estate of the mortgagor before foreclosure is still popularly, but erroneously, called an "equity of redemption"—the name it had when the legal estate was in the mortgagee and the right to redeem existed only in equity—such words are only a survival of old and now meaningless terms, the ideas they once represented having become obsolete. The rules which governed the relation of the parties less than one hundred years ago are, in the main, inadapted to the exigencies of today and the changed conditions which characterize the transaction, yet, it is noticeable that these old rules, founded upon and fitted to a different state of the law, have retained their hold to some extent upon later opinions, notwithstanding that the reasons which led to their adoption have ceased to exist.

The concluding statements of the foregoing paragraph are strikingly exhibited in those states where the technical distinction of law and equity still exists and where the old forms of actions have been preserved. In the reported decisions of these states many curious anomalies may be found in attempts to ap-

ply the exploded doctrines of mediaeval law to modern conditions. In the main they continue to recognize a certain degree of ownership in the mortgagee, some even contending that he is the owner of the fee, having the *jus in rem* as well as the *jus ad rem*,²⁷ and, as an action of ejectment is brought at law and not in equity, and the naked legal rights are the only ones to be considered, hence, it follows, under this line of decisions, that a mortgage is a sufficient title on which to maintain an action of ejectment against a mortgagor or other person in possession.²⁸

§ 135. **Actions by the mortgagee.**—At common law, when, by reason of non-payment of the mortgage debt on the day appointed in the condition, the estate had become absolutely forfeited to the mortgagee, the mortgagor, or other person in possession, became liable to immediate eviction at the suit of the mortgagee,²⁹ and, in such case, no notice to quit or demand of possession seems to have been necessary before resorting to the action.³⁰ The right of the mortgagee to enter and take possession was based on the principle, that after condition broken he was entitled to the legal estate in the land, and his entry upon same, being the entry of the legal owner, would be both rightful and lawful if effected without a breach of the peace, and, it would seem, if he succeeded in making an entry, even though by actual violence, his possession would still be lawful as that of an owner.

But the common law went further, for upon the execution of a mortgage, whether in fee or for years, the legal estate immediately vested in the mortgagee, the mortgagor, if retaining possession of the land, being regarded much in the character of a tenant at will. It would seem that the actual possession was rarely given to the mortgagee upon the execution of a mortgage, and, to avoid the consequences just mentioned, a clause was

²⁷ See *Oldham v. Pfeiffer*, 84 Ill. 102; *Hemphill v. Ross*, 66 N. C. 477; *Hager v. Brainerd*, 44 Vt. 294.

²⁸ *Kilgour v. Gockley*, 83 Ill. 109; *Marks v. Robinson*, 82 Ala. 69; *Shields v. Lozeau*, 34 N. J. L. 496.

²⁹ *Lyman v. Mower*, 4 Vt. 345; *Carpenter v. Carpenter*, 6 R. I. 542; *Carroll v. Ballance*, 26 Ill. 9; *Rockwell v. Bradley*, 2 Conn. 1.

³⁰ *Jackson v. Foster*, 4 Johns. (N. Y.) 215; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122; *Kilgour v. Gockley*, 83 Ill. 109.

usually inserted providing that until default in the payment of the mortgage debt the mortgagor might retain possession and receive the rents and profits. Where an agreement of this kind was inserted the mortgagor was entitled to remain in possession until default and should the mortgagee enter prior thereto such entry would be wrongful and the mortgagor might have trespass against him.³¹ On the other hand, in the absence of such agreement the mortgagee might enter at any time or proceed to eject the mortgagor by action.³²

Where the common law has not been modified or changed by statute the foregoing may still be regarded as expressing the generally received rules of law upon questions of this kind. By the execution of the mortgage the entire legal estate passes to the mortgagee,³³ and unless it is specifically provided that the mortgagor may retain possession until default in payment of the mortgage debt, the mortgagee may institute an action for the recovery of such possession as well before as after default.³⁴

§ 136. Continued—Modifications and denials of mortgagee's rights.—The foregoing, however, does not represent the prevailing American doctrine. At a comparatively early day it became settled, both at law and in equity, that as to all persons except the mortgagee, the legal estate was in the mortgagor. But this, being a contradiction in terms, presented the anomaly of two owners of the same estate at the same time, and the further inconsistency, that neither could enjoy the estate in the measure which it implied. This led to the enactment of laws defining the *status* and relation of the parties and determining their respective rights with regard to the land. In the main the legislation upon the subject has followed the lines laid down by the court of chancery, the object being to declare the true character of the transaction.

³¹ *Brown v. Cram*, 1 N. H. 169; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534.

³² *Newell v. Wright*, 3 Mass. 138; *Pettengill v. Evans*, 5 N. H. 54; *Blaney v. Bearce*, 2 Me. 132.

³³ *Terry v. Rosell*, 32 Ark. 478; *Toomer v. Randolph*, 60 Ala. 356; *Harper v. Ely*, 70 Ill. 581; *Sumwalt v. Tucker*, 34 Md. 89; *Tryon*

v. Munson, 77 Pa. St. 250; *Jones v. Smith*, 79 Me. 446; *Shields v. Lozeau*, 34 N. J. L. 496.

³⁴ *Barrett v. Hinckley*, 124 Ill. 32; *Esker v. Hefferman*, 159 Ill. 38; *Hobart v. Sanborn*, 13 N. H. 226; *Colman v. Packard*, 16 Mass. 39; *Marks v. Robinson*, 82 Ala. 69.

The statute, as now enacted in a majority of the states, generally denies to a mortgagee a remedy by ejectment, and as the progress of judicial decision, in such states, has deprived him of the least estate in the land and left him only a lien, it follows that he no longer possesses any right to possession, either before or after condition broken, except as he may acquire it by a valid foreclosure or through the express or necessarily implied consent of the mortgagor.³⁵ Where this rule prevails the only remedy of the mortgagee is by foreclosure of his lien and after sale and deed, should he become the purchaser, if possession is withheld, he may apply to the court for a writ of assistance, which is generally granted as of course.³⁶ In such event the mortgagee will be placed in possession without the necessity of resorting to ejectment,³⁷ and this, although the delivery of possession may not have been one of the mandates of the decree of sale.³⁸

§ 137. **Actions by the mortgagor—Against mortgagee.**—As we have seen, the effect of the execution of a mortgage, at common law, was to vest the mortgagee with the full legal title to the mortgaged land, and, as a necessary incident thereto, with the right of possession. This right, as heretofore shown, might be curtailed by a contemporaneous agreement providing for the retention of possession by the mortgagor until default in the condition, and, in such event, an entry by the mortgagee prior to such default would be tortious. If, however, the mortgagee or his assignee had lawfully acquired possession after condition broken, ejectment would not lie against him nor would his possession be disturbed at the suit of the mortgagor.³⁹ But the mortgagee might be let into possession at any time before forfeiture, in which event his occupancy would be lawful,

³⁵ *Howell v. Leavitt*, 95 N. Y. 617; *Rountree v. Denson*, 59 Wis. 522; *Fox v. Wharton*, 5 Del. Ch. 200; *McMahon v. Russell*, 17 Fla. 698; *Mack v. Wetzlar*, 39 Cal. 247; *Hurley v. Estes*, 6 Neb. 386.

³⁶ *Hibernia, etc. Soc. v. Lewis*, 117 Cal. 577; *Jones v. Hooper*, 50 Miss. 510; *Watkins v. Jerman*, 36 Kan. 464.

³⁷ *Stanley v. Sullivan*, 71 Wis. 585; *Hagerman v. Hetzel*, 21 Wash. 444.

³⁸ *Oglesby v. Pearce*, 68 Ill. 220.

³⁹ *Phyfe v. Riley*, 15 Wend. (N. Y.) 248; *Jackson v. Winkler*, 10 Johns. (N. Y.) 480; *Fountain v. Bookstaver*, 141 Ill. 461.

he being regarded for most purposes as a steward or bailiff of the mortgagor, to whom he was liable to account for the rents and profits.⁴⁰ This seems to have been the generally received doctrine both in England and America.

The foregoing doctrines, in many respects, have been retained in modern practice, and are given a marked prominence in the judicial decisions of most of the states. The general rule now is, that while a mortgagee is not permitted to maintain a possessory action to recover the mortgaged premises by reason of the default of the mortgagor, still, if he can make a peaceable entry upon the lands after condition broken, he may do so, and may retain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of the mortgage debt.⁴¹ Where it is conceded that a mortgagee may come rightfully into possession before forfeiture such possession may be continued until the mortgage debt is paid or otherwise discharged.⁴² Indeed, the taking possession of mortgaged property has long been recognized as one of the methods of collecting the mortgage debt,⁴³ and while a mortgagee so in possession, as previously stated, will be liable to account for the rents and profits of the land actually received, or for such as by proper diligence might have been received, to be credited upon the debt, yet his possession, if peaceably acquired, cannot be disturbed either by the mortgagor or any one claiming under him subsequent to the execution of the mortgage.⁴⁴

In some of the cases special emphasis is placed upon the fact that the possession of the mortgagee must have been taken with

⁴⁰ *Van Buren v. Olmstead*, 5 Paige (N. Y.), 9; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *Saunders v. Frost*, 5 Pick. (Mass.) 259.

⁴¹ *Cooke v. Cooper*, 18 Oreg. 142, 17 Am. St. Rep. 109; *Bosse v. Johnson*, 73 Tex. 608; *Phyfe v. Riley*, 15 Wend. (N. Y.) 248; *Pell v. Ulmar*, 18 N. Y. 139; *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. 613, 38 N. W. Rep. 765.

⁴² *Harper v. Ely*, 70 Ill. 581;

Emory v. Kelghan, 88 Ill. 482; *Hosford v. Johnson*, 74 Ind. 479; *Martin v. Fridley*, 23 Minn. 13; *Wright v. Ross*, 36 Cal. 434; *Damon v. Dures*, 66 Mich. 347; *Grayson v. Weddle*, 67 Mo. 590; *Kelso v. Norton*, 65 Kan. 778, 93 Am. St. 308, 70 Pac. Rep. 896.

⁴³ *Kilgour v. Gockley*, 83 Ill. 109.

⁴⁴ *Fountain v. Bookstaver*, 141 Ill. 461; *Hennessy v. Farrell*, 20 Wis. 46; *Cross v. Knox*, 32 Kan. 736.

the assent of the mortgagor; that the right of entry under the mortgage having been taken away, the privilege of possession can be acquired only by the agreement or assent of the one who holds such right.⁴⁵ But such assent need not be express. It may be implied from circumstances,⁴⁶ and, generally, if the mortgagor obtains possession by any lawful or peaceable mode⁴⁷ he may retain it until his mortgage debt is paid, and neither the mortgagor nor his heir can maintain ejectment for its recovery.⁴⁸ The only remedy in such case is a bill to redeem.⁴⁹ On the other hand, if the mortgagee has acquired possession by force or fraud, without the consent of the mortgagor and without color of lawful authority, his mortgage will constitute no defense to an action of ejectment brought by the owner.⁵⁰

§ 138. **Provisions for possession.**—It is a common practice in the draughting of mortgages, to insert a provision to the effect that in case of default in any of the payments thereby secured or of any of the conditions therein contained, the mortgagee shall be entitled to immediate possession of the premises. This provision has frequently been held valid and enforceable, as being in the nature of an additional security for the mortgage debt,⁵¹ and will generally be upheld in all cases where the statute is silent on the subject of possession. Where the statute expressly provides for the retention of the legal title, and the consequent right of possession, by the mortgagor, it is still competent for the parties to stipulate for the right of possession, and when this is done by a provision of the mortgage, and possession is assumed by virtue of such provision, the mortgagee will not be disturbed while the debt remains unpaid.⁵²

⁴⁵ *Rogers v. Benton*, 39 Minn. 39.

⁴⁶ As where the mortgagor abandons possession, his assent that the mortgagee may enter may well be implied, especially where he allows the mortgagee to remain in possession for a considerable length of time. *Rogers v. Benton*, 39 Minn. 39.

⁴⁷ As where he purchases at a void foreclosure sale and enters into possession. *Cooke v. Cooper*,

18 Oreg. 142; *Miner v. Beckman*, 50 N. Y. 337.

⁴⁸ *Fee v. Swingly*, 6 Mont. 596; *Frink v. LeRoy*, 49 Cal. 314; *Brinkman v. Jones*, 44 Wis. 512; *Wells v. Van Dyke*, 109 Pa. St. 355; *Duke v. Reed*, 64 Tex. 705.

⁴⁹ *Cross v. Knox*, 32 Kan. 725.

⁵⁰ *Howell v. Leavitt*, 95 N. Y. 617.

⁵¹ See *Spect v. Spect*, 88 Cal. 437.

⁵² *Felino v. Lumber Co.*, 64

§ 139. **Accounting and payment.**—Nor does it seem, where the method of procedure described in the foregoing paragraph obtains, that a mortgagor may maintain an action of ejectment against a mortgagee in possession even though it be averred that the mortgagee has collected from the rents and profits a sum sufficient to extinguish the mortgage debt,⁵³ nor even where a tender of the amount alleged to be due has been made.⁵⁴ The reason for this is, that ejectment is distinctly a legal action and hence disputed questions as to the amount actually due can not be settled therein.⁵⁵ And it would further seem that the rule is the same whether the mortgage is regarded as a substantive conveyance of the legal estate or merely as creating a lien. In either event a mortgagee in possession assumes the *quasi* character of a trustee or steward of the mortgagor. He is charged with the rents and profits and the mortgagor is entitled to have them applied in liquidation of the debt, but not in the first instance. The law does not apply them as received to the extinguishment of the mortgage. In many cases complicated equities must be determined and adjusted before it can be ascertained what part, if any, of the rents and profits received is to be applied to the mortgage debt. The mortgagee is entitled to have them applied to reimburse him for taxes and necessary repairs; for sums paid to remove prior incumbrances, in order to protect the title; for costs incurred in defending the title, and for other legitimate purposes. Therefore, to enable the mortgagor to maintain an action for possession an accounting must first be had in equity and the rights of the parties ascertained,⁵⁶ while many of the authorities affirm that his only remedy to recover possession from the mortgagee, after the mortgage debt has been paid, is a bill to redcem.⁵⁷ This right to redeem is

Neb. 335, 89 N. W. Rep. 755, 97 Am. St. 646.

⁵³ Hubbell v. Moulson, 53 N. Y. 225.

⁵⁴ Fountain v. Bookstaver, 141 Ill. 461.

⁵⁵ Oldham v. Pfleger, 84 Ill. 102; Hubbell v. Moulson, 53 N.

Y. 225. And see Jones, Mtgs., § 716; Adams, Eject. 106.

⁵⁶ Fountain v. Bookstaver, 141 Ill. 461; Hubbell v. Moulson, 53 N. Y. 225.

⁵⁷ Rowell v. Jewett, 69 Me. 293; Posten v. Miller, 60 Wis. 494; Chapin v. Wright, 41 N. J. Eq. 438.

cognizable only in equity and can be asserted, it is claimed, in no other form.⁵⁸

It may be further stated, that the rules which govern the relations of the immediate parties to the transaction apply with equal force to their assigns.⁵⁹

§ 140. **Variances and exceptions.**—To the foregoing statements an exception may be noted in those states where the action of ejectment is permitted to assume the character of a proceeding in equity.⁶⁰ In such states, if the mortgage debt is fully paid the mortgagor is entitled to possession; if it has not been paid the mortgagee has the right to retain possession until out of the rents and profits, or otherwise, the residue is paid. But, in any event, the equitable right of redemption of the mortgagor may be enforced in an action of ejectment, which may be employed as a substitute for a bill to redeem. In such cases it is the duty of the jury, under the direction of the judge sitting as a chancellor, to ascertain how much the mortgagee in possession has realized from the rents and profits. If they find he has received, or in the exercise of reasonable diligence should have realized, enough to pay the sum secured, a general verdict for plaintiff should be rendered; if not, a conditional or special verdict may be found in such form that, upon payment of the residue, the mortgagor may, without unnecessary delay, obtain possession of the premises.⁶¹

§ 141. **Debt barred by limitation.**—The equitable principle which governs the rule that a mortgagor cannot maintain ejectment against a mortgagee in possession until the debt is paid, does not admit of satisfaction of the debt by mere lapse of time. The statute of limitations, it is said, is a bar to the remedy only but does not extinguish, or even impair, the obligation of the debtor, and notwithstanding such debt

⁵⁸ *Linnell v. Luford*, 72 Me. 280; *Chapin v. Wright*, 41 N. J. Eq. 445.

⁵⁹ *Fountain v. Bookstaver*, 141 Ill. 461; *Hubbell v. Moulson*, 53 N. Y. 225; *Robinson v. Ryan*, 25 N. Y. 320.

⁶⁰ In Pennsylvania ejectment is strictly an equitable proceed-

ing, while in states which have abolished the old forms of action it partakes of an equitable character in so far, at least, that equitable relief may be administered in connection with a judgment of recovery.

⁶¹ See *Mellon v. Lemmon*, 111 Pa. St. 56.

may not be asserted as a cause of action it is always available as a defense. This will certainly be the case in all jurisdictions where an equitable defense may be interposed to an action for the recovery of real property, whether the mortgage operates to convey a defeasible title or is regarded only as a mere security contract incident to the debt. In neither case will the mortgagor, or one claiming under him subsequent to the mortgage, be permitted to maintain ejectment against one shown to be a mortgagee in possession with the mortgage debt unpaid, although at the time the statute of limitations would bar an action on the debt or to foreclose the mortgage.⁶²

§ 142. **Actions by the mortgagor—Against strangers.**—Notwithstanding that by the common law the legal title and estate in the mortgaged lands passed to and became vested in the mortgagee upon the execution of the mortgage, the principle was early announced in the American cases that as to all the world, except the mortgagee, the freehold remained in the mortgagor in the same condition in which it was prior to the mortgage.⁶³ Being thus clothed with all his rights as a freeholder as to all persons other than the mortgagee or his assigns, it followed that he might maintain any action for an injury to the inheritance or possession,⁶⁴ and the mere fact that the legal title was in the mortgagee could not be urged as a defense.⁶⁵

Where, as is generally the case, the mortgage is regarded as a mere lien, the right to recover possession from a stranger can not be questioned, as this is one of the attributes of ownership and an inseparable right of property.

§ 143. **Equitable mortgages.**—An absolute deed conveying land in fee, passes the legal title, although made and delivered only as security for a debt, and recovery may be had

⁶² *Kelso v. Norton*, 65 Kan. 778, 93 Am. St. 308, 70 Pac. Rep. 896; *Spect v. Spect*, 88 Cal. 437, 22 Am. St. 314, 26 Pac. Rep. 203; *Johnson v. Sandhoff*, 30 Minn. 197; *Duke v. Reed*, 64 Tex. 705. ⁶³ *Willington v. Gale*, 7 Mass. 138; *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290; *Hall v. Lance*, 25 Ill. 277; *Barrett v. Hinckley*, 124 Ill. 32; *Wilkins v. French*, 20 Me. 111; *Buck v. Payne*, 52 Miss. 271. ⁶⁴ *White v. Rittenmeyer*, 30 Iowa, 268; *Hall v. Lance*, 25 Ill. 277; *Bird v. Decker*, 64 Me. 550. ⁶⁵ *Allen v. Kellam*, 69 Ala. 442; *Savage v. Dooley*, 28 Conn. 411; *Hardwick v. Jones*, 65 Mo. 54.

thereon in ejectment by the grantee against the grantor.⁶⁶ This is the general rule in all of the states which still preserve the technical distinction of law and equity, and is also the rule observed in the federal courts.

Where equitable defenses are permitted the grantor of an absolute deed, intended only as a mortgage, may defend successfully when sued for the possession by interposing an equitable plea and tendering the debt and interest.⁶⁷ This is the rule in most of the code states, or states where law and equity may be administered in the same action.

V. VENDOR AND PURCHASER.

§ 144. Relation of the parties.	§ 147. Actions by the vendee.
145. Right of possession.	148. Actions against vendee
146. Actions by the vendor.	by third persons.

§ 144. Relation of the parties.—The relative positions sustained toward each other by the vendor and purchaser of real property, under an executory contract of sale, are somewhat peculiar, and vary greatly accordingly as they are viewed from a legal or an equitable standpoint.

It has long been a familiar principle of equity that things agreed to be done are to be regarded as actually performed, and, in furtherance of this principle, a contract for the sale of land is, for many purposes, regarded in equity as if specifically executed; the estate, from the making of the contract is looked upon as the property of the vendee, while the purchase money is considered as belonging to the vendor.⁶⁸ At law, however, the contract receives only the interpretation expressed upon its face, and confers upon the parties mere rights of action; the estate remains the property of the vendor and the unpaid purchase money that of the vendee.⁶⁹ Yet, while the question of

⁶⁶ *Biggers v. Bird*, 55 Ga. 650; *McGinnis v. Fernandes*, 126 Ill. 228.

⁶⁷ *Biggers v. Bird*, 55 Ga. 650; *Dobbs v. Kellogg*, 53 Wis. 448; *Walls v. Erdel*, 20 Fla. 86; *Hughes v. Davis*, 40 Cal. 117.

⁶⁸ *Lombard v. Sinai Congrega-*

tion, 64 Ill. 477; *King v. Ruckman*, 21 N. J. Eq. 599; *Kerr v. Day*, 14 Pa. St. 112; *Dorsey v. Hall*, 7 Neb. 464; *Pease v. Kelley*, 3 Oreg. 417; *Baum v. Grigsby*, 21 Cal. 175.

⁶⁹ *Lombard v. Sinai Congregation*, 64 Ill. 477.

title in a legal controversy growing out of the relation is comparatively well settled, the question of possession frequently presents complicated aspects and even in a purely legal action the influence of the equities of the parties is not without a marked and sometimes controlling effect.

§ 145. **Right of possession.**—It is a rule of general and uniform observance that the legal title to land draws to it the legal possession of the same, and this rule has often been applied in the solution of questions growing out of the relation of vendor and vendee. A contract of sale is prospective in its operation, and does not, without special stipulation, confer any rights of immediate occupancy upon the vendee. The legal title which the vendor retains until final execution is attended with all its legal incidents, including the right to hold, possess and enjoy the land; and the vendee cannot, at least until full payment has been made of the purchase money, claim any possessory rights in the premises he has contracted to purchase. The mere fact that a person has made a contract for the purchase of land does not entitle him to enter upon and hold it, and a purchaser's possession so obtained, in the absence of some agreement permitting him to enter, would be unauthorized and unlawful.⁷⁰ Yet where a party's land is in the actual possession of another, even though unlawfully, he has no right forcibly to repossess himself, but must resort to the action of forcible entry and detainer or the action of ejectment, or whatever other form of action the law may have provided to enforce a claim of the possession or delivery of specific real property.⁷¹

Where a party enters into possession of lands under a contract of purchase, the most that can be implied from such a contract is permission to enter while the conditions are maturing, as a tenant at will, and to occupy as such.⁷² Generally the courts in referring to such occupation speak of the vendee's possession as acquired under and by virtue of a license, and while such occupation bears a nearer affinity to a tenancy at will than to any other form of estate which it may resemble, yet,

⁷⁰ *Williams v. Forbes*, 47 Ill. 173; *Hyatt v. Wood*, 4 Johns. 148. (N. Y.) 150; *Dwight v. Cutler*,

⁷¹ *Allen v. Tobias*, 77 Ill. 169. 3 Mich. 566; *Davidson v. Ernst*,

⁷² *Dean v. Comstock*, 32 Ill. 7 Ala. 817.

in the absence of any reservation of rent or other method of compensation for such occupancy, it is not such a tenancy as to properly create the relation of landlord and tenant. For this reason the questions which have arisen in the course of the settlement of disputes growing out of the vendee's occupancy have not always been productive of a uniformity of decision.

The vendee in possession under an executory contract is in all cases under legal obligation to promptly pay the stipulated purchase money at the time or times when it may become due, and to faithfully perform any of the conditions precedent upon which the sale is based; and, failing in this, the vendor has a right to elect whether he will abandon the contract and re-enter upon his lands, or hold the vendee to his agreement, if the contract is such a one as can be enforced by compelling specific performance.⁷³ In the former event he may, if he sees fit, treat the vendee as his tenant, and recover against him for the use and occupation of the land,⁷⁴ or he may regard him as a trespasser and eject him by suit.⁷⁵ The possession of the vendee is not adverse to the vendor, in the legal sense of the term, but consistent with his title.⁷⁶

§ 146. **Actions by the vendor.**—It would seem to be an established rule at the present time, that ejectment is not maintainable by a vendor against his vendee in possession under an executory contract of sale who is not in default in the performance of his contract,⁷⁷ or who has performed it and is in position to demand a deed, or who seasonably and in good faith offers to comply with the terms of his purchase, and continues ready to comply with them.⁷⁸ To a vendee in possession under such circumstances the contract will avail him as a defense to an action of ejectment, or as a cross-action in equity to enforce

⁷³ *Seabury v. Doe*, 22 Ala. 207;
Dean v. Comstock, 32 Ill. 173;
Williams v. Forbes, 47 Ill. 148.

⁷⁴ *Davidson v. Ernst*, 7 Ala. 817.

⁷⁵ *Hicks v. Lovell*, 64 Cal. 14;
Jackson v. Miller, 7 Cow. (N. Y.) 751;
Gibbs v. Sullens, 48 Mo. 237;
Dean v. Comstock, 32 Ill. 173;
Harle v. McCoy, 7 J. J. Marsh. (Ky.) 318.

⁷⁶ *Jackson v. Camp*, 1 Cow. (N. Y.) 605.

⁷⁷ *Hutchinson v. Coonley*, 209 Ill. 437.

⁷⁸ *Prentice v. Wilson*, 14 Ill. 91;
White v. Livingstone, 10 Cush. (Mass.) 259;
Cavalli v. Allen, 57 N. Y. 508. And see
Whittier v. Stege, 61 Cal. 238.

a trust against his vendor, or to obtain a specific enforcement of the contract.⁷⁹ The statute is largely responsible for this condition, as, under the strict rules of the common law such defenses would be unavailable. In all of the states, however, there have been marked departures from the common-law rule in litigation between vendor and vendee, and in those states which permit a defendant to set up as many defenses as he has, whether they are such as were formerly denominated legal or equitable, any defense which serves to bar the vendor's right of entry may be shown.

But where a vendee who has been let into possession under such a contract fails to comply with the terms of the same, as where there has been default in the stipulated payments; or if after maturity of the purchase money the vendor tenders a deed and demands payment, which the vendee refuses to make; or if there has been a default in the performance of any of the conditions precedent to the execution of the conveyance; or if the vendee has abandoned the purchase and repudiates the title of his vendor, then, in every such case, the vendee forfeits the benefit of the contract, and cannot avail himself of it as a defense to an action of ejectment by his vendor.⁸⁰ The vendor in such event has an option either to sue for a specific performance in a proper case or to abandon the contract and bring an action for the recovery of the land.⁸¹ The refusal of the vendee amounts to an abandonment on his part; and should the vendor in the exercise of his election assent to its abandonment, a complete dissolution of the contract is effected by the mutual

⁷⁹ *Love v. Watkins*, 40 Cal. 548; *Crary v. Goodman*, 12 N. Y. 266.

⁸⁰ *Thorne v. Hammond*, 46 Cal. 530; *Jackson v. Moncrief*, 5 Wend. (N. Y.) 26; *Dean v. Comstock*, 32 Ill. 173; *Williams v. Forbes*, 47 Ill. 148.

⁸¹ *Keys v. Mason*, 44 Tex. 144. Where a contract is entered into for the sale of land by the terms of which the purchaser is to pay \$500 down and enter into immediate possession of the premises,

a second instalment to be paid in ten months and the residue at deferred periods, and the vendor is to execute a deed in two months, the vendor is entitled to maintain an action of ejectment on the default of the purchaser to pay the second instalment, although the first instalment was punctually paid and the vendor did not before bringing suit tender a deed. *Wright v. Moore*, 21 Wend. (N. Y.) 230.

and concurring assent of both parties;⁸² and neither party may thereafter invoke its terms or protection as against the other.⁸³ The vendor is by this event restored to his original position; he cannot now sue for a breach nor compel a specific performance, because the contract itself has been dissolved; but he is at liberty to maintain ejectment to recover the possession of the land to which he has the legal title.⁸⁴ In every such event ejectment is a proper remedy against the vendee, and the vendor will be entitled to a judgment for possession.⁸⁵

A right of action will subsist in favor of the vendor where the vendee has been let into possession under a void sale;⁸⁶ as also where possession has been given him under an agreement that he would quit and surrender up possession if he should not pay the purchase money on a given day; and in such cases ejectment will lie without notice on failure to perform, the agreement operating in much the same manner as a clause of re-entry on breach of covenant in a lease.⁸⁷

§ 147. **Actions by the vendee.**—Ejectment only lies where the ejector possesses the legal title; and however strong the equities may be, the rule, in general, is well established that

⁸² *Graves v. White*, 87 N. Y. 465.

⁸³ *Hicks v. Lovell*, 64 Cal. 14.

⁸⁴ *Wright v. Moore*, 21 Wend. (N. Y.) 230; *Dean v. Comstock*, 32 Ill. 173.

⁸⁵ *Thompson v. Ellenz*, 58 Minn. 301. But compare *Mack v. Dailey*, 67 Vt. 90, 30 Atl. Rep. 686.

⁸⁶ A., the undisputed owner of a tract of land, entered into an agreement with sundry parties to convey it to them, and to execute deeds therefor in accordance with the various portions which should fall to each from a lottery held to determine each man's share. The lottery was held and lot No. 52 fell to B., and lot No. 38 to one C. B. and C. agreed to exchange their lots, and C. took possession of No. 52. Deeds for the several lots

were executed, but never delivered. There was some evidence that C. had put improvements on the lot, which were afterwards removed. In an action by A. against C. to recover this lot, *held*, that the defendant's claim to the lot, having its origin in a lottery contract, was void; and that, as the deed therefor was never delivered, this was a parol sale of land and void under the statute of frauds; and that the plaintiff's claim, resting upon an untainted legal title, unaffected by the collateral illegal contract, entitled him to a verdict. *Allebach v. Godshalk*, 116 Pa. St. 329, 9 Atl. Rep. 444.

⁸⁷ *Smith v. Stewart*, 6 Johns. (N. Y.) 46; *Central Pac. R. R. Co. v. Mudd*, 59 Cal. 585; *Ritchie v. Railway Co.*, 55 Kan. 36.

such equities cannot prevail over the legal title.⁸⁸ For this reason a vendee under an executory contract cannot maintain ejectment against his vendor, but must resort to a court of chancery to assert and establish his rights. But in some states, as in Pennsylvania, there are no courts of chancery, and equitable relief in such cases can only be administered in legal actions. Under such conditions an action of ejectment brought by a vendee against his vendor, under articles of sale, is the equivalent of a bill in chancery for specific performance, and may in all proper cases be maintained.⁸⁹ But in order to enforce a specific performance by ejectment the vendee must have paid or tendered the purchase money before bringing suit;⁹⁰ and where the possession of the vendor is lawful the vendee cannot maintain his action without proof of such previous payment or tender, and in case of a tender must also keep the same good by producing the money in court. Until he has thus put his vendor in default he has no cause of action; nor can he demand a verdict conditioned on his subsequent payment of the purchase money.⁹¹

With respect to third persons, but subject nevertheless to the rules first stated, a vendee in possession may defend the same, and upon the strength of his equitable title may oust any one not having a superior right of entry.⁹² As against a mere trespasser, bare peaceable possession has often been held sufficient to maintain ejectment.⁹³

§ 148. **Actions against vendee by third persons.**—Where a vendee has been let into possession under an executory contract he comes fully within the term “occupant,” and as such may be proceeded against by a third person who claims paramount title. Usually, if the vendor does not interfere to protect

⁸⁸ *McKay v. Williams*, 67 Mich. 547; *Barrett v. Hinckley*, 124 Ill. 32; *Williams v. Peters*, 72 Md. 584; *Johnson v. Pontious*, 118 Ind. 270.

⁸⁹ *Rennyson v. Rozell*, 106 Pa. St. 412. This is probably peculiar to the jurisprudence of Pennsylvania, and does not prevail to any extent in other states.

⁹⁰ *Vincent v. Huff*, 4 Serg. & R., (Pa.) 298.

⁹¹ *Bell v. Clark*, 111 Pa. St. 92.

⁹² *Seymour v. Creswell*, 18 Fla. 29; *Wilson v. Glenn*, 68 Ala. 383.

⁹³ *Wilson v. Glenn*, 68 Ala. 383; *House v. Reavis*, 89 Tex. 622, 35 S. W. Rep. 1063; *Sherin v. Brackett*, 36 Minn. 152.

the possession judgment must go against the vendee, as his right consists only of an incipient equity. But, as a judgment in ejectment concludes only the party against whom it is rendered, and persons who claim through or under such party by a title accruing after the commencement of the action, it follows that such judgment can have no appreciable effect upon the rights of the vendor, and notwithstanding he may have had notice of the pendency of the suit the judgment rendered therein cannot be set up to defeat an action of ejectment subsequently brought by him for the same land.⁹⁴ As between the vendor and vendee themselves, if ejectment be brought against the latter, and he notifies his vendor to defend, the judgment might, for some purposes, be held conclusive, but no such result will follow where a third party is concerned. In this respect there is a marked difference between the relation of vendor and vendee and that of landlord and tenant and the rules which govern the latter relation where a tenant in possession is sued have no application to the former.

VI. LANDLORD AND TENANT.

§ 149. Generally.	§ 155. Tenants.
150. Landlords.	156. Tenants for years.
151. Cumulative remedies — Rent in arrears — Notice.	157. Tenants at will.
152. Forfeiture—Default generally.	158. Tenants from year to year.
153. Assignee of landlord.	159. Tenants by sufferance.
154. Landlords as defendants.	160. Entry under void lease.
	161. Forfeiture of tenants' rights.

§ 149. Generally.—The subject of landlord and tenant must necessarily receive much attention in a work devoted to an exposition of the law relating to the recovery of land. It might, perhaps, have been better if everything relating to the relation had been grouped under one head, but this, while conducing to convenience in some things, would have produced much inconvenience in other things, and, in large measure, would have defeated the author's plan of systematic development of the general subject of the book. It is hoped that the in-

⁹⁴ Cadwallader v. Harris, 76 Ill. 370.

dulgent reader will overlook this defect, if it shall be found to be a defect, and for those phases of the relation which do not appear in the following paragraphs, will consult the other parts of the work where they are discussed with other cognate topics.

§ 150. **Landlords.**—From a very early period in the history of the action it would seem that ejectment has been resorted to by landlords, on the determination of tenancies, to recover possession of their lands from refractory tenants. This use has, to a large extent, been superseded in recent years by the employment of the more summary remedy of unlawful detainer, but ejectment may still be brought, and, in some cases, is the only form of action available.

The action will always lie against a tenant where a right of re-entry has accrued through a breach of any of the covenants or conditions of the lease, and usually but little difficulty is experienced in obtaining a recovery. But at the time when provisions of this kind were first introduced it would seem to have been otherwise. The early law was prolific in subtleties and fine-spun distinctions, and the preliminaries required before a landlord could bring an ejectment upon a clause of re-entry were of such a character as to render it next to impossible, in many cases, to take advantage of provisions of this kind. The greatest difficulty seems to have arisen in respect to clauses of re-entry for non-payment of rent. Under the old law a demand of the rent, either in person or by an authorized agent, was first required to be made. The demand was further required to be of the exact amount due, and if a penny more or less was asked it was vitiated. The demand was still further required to be made upon the precise day when the rent became due, at some convenient time before sunset, upon the land and at the most notorious place. In pursuance of this latter requirement it was held that if there was a house upon the land the demand must be made at the front door of the house. In every case an actual demand for the rent was required to be made, although, in fact, there might be no person on the land to pay it. To make matters worse, the courts, notwithstanding the landlord's compliance with all the required formalities, would set aside the forfeiture, upon payment of the debt and costs, at any time before execution was served, and the tenant was always at liberty to apply to a court of equity for relief.

These were only a few of the many vexatious difficulties to which a landlord was subjected and it was many years before he was relieved of the duty of observing all the forms and niceties of the common law. The first relief was an enactment⁹⁵ exempting him from the necessity of demand where no sufficient distress could be found upon the premises, but otherwise he was obliged to comply with all the formalities before he could proceed upon a proviso for re-entry. The same act took from the court the discretionary power formerly exercised, of staying proceedings at any stage upon payment of the rent in arrear, and its provisions generally are the foundation upon which subsequent rules have been erected.

At the present time the relation of landlord and tenant is regulated in all of the states by express statutory provisions which fix the methods by which tenancies may be determined and rights of re-entry established. The vexatious requirements of the old law have been abolished and the procedure simplified in conformity with modern ideas. Leases may be forfeited for breach of conditions as at common law and, in addition, cumulative remedies are generally provided by which possession may be regained when default has been made in the payment of stipulated rent.⁹⁶

§ 151. **Cumulative remedies—Rent in Arrear—Notice.**—The English statutes⁹⁷ giving a landlord the right to commence an action of ejectment for the recovery of demised lands when half a year's rent is in arrear and unpaid, without any formal demand, have been substantially re-enacted in most of the American states. This remedy, however, is cumulative only and does not destroy the landlord's right to create or declare a forfeiture of lease by the common-law methods,⁹⁸ and, because the tenant may at any time before judgment, or in some cases after judgment and before execution, restore himself by pay-

⁹⁵ 4 Geo. II, c. 28, and 11 Geo. II, c. 19.

⁹⁶ These remedies are all very modern. For many years the common-law requisites for the termination of tenancies and recovery of demised land pre-

valled, and decisions declaring and confirming the common-law rules will be found in all of the states east of the Mississippi.

⁹⁷ 11 Geo. II, 19.

⁹⁸ Chadwick v. Parker, 44 Ill. 326.

ment of the arrears and costs, is seldom resorted to where the object is not to collect rent but to regain possession.

Provision is also made for the termination of tenancies by notice, the time of notice varying somewhat in the different states. Where notice has been given in the manner provided by statute no other notice or demand of possession will, as a rule, be required before bringing ejectment, although, in most cases, the effect of the notice may be avoided by payment of the rent before the expiration of the time therein limited.⁹⁹ The object of these statutes is to dispense with the common-law requirements of demand of rent upon the premises, etc., as detailed in the preceding paragraph,¹ and to afford an efficient and speedy remedy that shall be just alike to both parties.

§ 152. **Forfeiture—Default generally.**—The statute has extended the privilege of forfeiture by demand and notice to all defaults that may be made in any of the terms of a lease, and has further provided a form of notice and method of service, and where such default has occurred and full compliance with statutory requirements is shown, no other notice or demand of possession is necessary to terminate a tenancy. Clear and strict proof of service of demand and notice is essential, however, to entitle the landlord to a judgment of forfeiture.²

§ 153. **Assignee of landlord.**—The English statutes relating to the assignment of leases are the basis of American laws upon this subject.³ The general rule now is that the grantees of any demised lands, or of the reversion thereof; the assignees of the lessor of any demise; and the heirs of such grantees or assignees have the same remedies by entry, action or otherwise, for the non-performance of any agreement of the lease or other cause of forfeiture, as their grantor or assignor might have had if no grant or assignment had been made. No

⁹⁹ Woodward v. Cone, 73 Ill. 241; Leary v. Pattison, 66 Ill. 203.

¹ Dodge v. Wright, 48 Ill. 382; Burt v. French, 70 Ill. 254.

² Henderson v. Coal Co., 140 U. S. 25; Farnam v. Hohman, 90 Ill. 312.

³ The statute 32 Henry VIII, c. 34, made leases assignable, but required an attornment by the tenant. The statute of 4 Anne, c. 16, dispensed with attornment. The substance of these statutes has been re-enacted in this country.

attornment is necessary to enable the grantee to recover,⁴ and the tenant is subject to the same estoppels that he would have been had the title remained in the original lessor.⁵

§ 154. **Landlords as defendants.**—It is a fundamental rule of the action that if the lands in controversy are occupied at the time of suit such occupant shall be named as a party defendant. This is the common-law rule, which has been re-affirmed and declared in every state by statute, and, while the statute now permits all other persons claiming interests in the land to be joined as defendants it does not appear that any other than the occupant is a necessary party. Not infrequently however, the person so in possession is not the owner but a tenant, and, in a majority of cases, such tenant is indifferent as to the whole matter. By statute a tenant who is thus sued in ejectment is required to forthwith give notice of the pendency of the suit to the person under whom he holds, and the landlord may then defend the suit in the name of his tenant or he may be let in to defend in person. Should a tenant who has thus been sued neglect to notify his landlord and suffer a judgment of eviction to be entered against him, such judgment, whatever may be its effect with respect to the tenant, will not bind the landlord.⁶

As the statute is generally phrased the privilege of intervention is given to landlords only,⁷ and it would seem that formerly considerable difficulty often arose as to the meaning of the term "landlord," and as to what interest in the lands in controversy would be sufficient to enable a person claiming title to appear and defend the action.⁸ The earlier cases seem to hold that not every person claiming title could be admitted to defend as landlord but only those who were in some degree in possession, as where a person is receiving rent, or matters of that kind. But this doctrine was afterward repudiated and the

⁴ *Thomasson v. Wilson*, 146 Ill. 384; *Kellum v. Insurance Co.*, 101 Ind. 456.

⁵ *Cantwell v. Moore*, 44 Ill. App. 657; *Kennard v. Harvey*, 80 Ind. 41; *Allen v. Shannon*, 74 Ind. 168.

⁶ *Lowe v. Emerson*, 48 Ill. 160;

Rogers v. Rippey, 25 Wend. (N. Y.) 432.

⁷ *Linderman v. Berg*, 12 Pa. St. 301.

⁸ See *Jackson v. McEvoy*, 1 Calnes (N. Y.), 151; *Ralston v. Doe*, 36 Ga. 611; *Linderman v. Berg*, 12 Pa. St. 301.

term landlord was held to extend to every person whose title is connected to, and consistent with, the possession of the occupant.⁹ Where a person claims in opposition to the title of the tenant in possession he cannot be considered as a landlord and the manifest injustice to the tenant in making him a co-defendant is apparent.

This doctrine has received a very general acceptance in the United States,¹⁰ and in many jurisdictions is declared by statute. On the landlord's application to be let in he must show this fact of connection and consistency by proper averment,¹¹ but, it seems, he need not set out his title.¹²

Where the relation of landlord and tenant is shown to exist the former is generally entitled, as a matter of right, to be let in to defend,¹³ and this he may do as a co-defendant,¹⁴ or in the name of the tenant.¹⁵ He may also defend in his own name and right after a substitution of parties, but it seems he cannot claim this privilege unless the plaintiff shall consent to such substitution.¹⁶

§ 155. **Tenants.**—Strictly speaking, every person in the possession of land by lawful investiture is a tenant, irrespective of the character of his estate, or the terms by which he holds. Thus, the owner of the fee is a tenant, equally with one who holds by the most precarious and uncertain tenure. They differ in degree, not in kind. But, for many years it has been customary to class the holders of estates less than freeholds as tenants, and by that name to distinguish them from persons owning the dominant estates. The classification has been found convenient in practice and, by reason of its very general employment by the laity, has come to be used by the

⁹ This doctrine seems to have been first announced by Lord Mansfield in *Fairclain v. Shamtitle*, Burr. (Eng.) 1294.

¹⁰ *Stribling v. Prettyman*, 57 Ill. 371; *Vancleve v. Green*, 20 N. J. L. 171.

¹¹ *Williams v. Brunton*, 3 Gil. (Ill.) 600; *Jackson v. Stiles*, 6 Cow. (N. Y.) 594; *Bryant v. Kinlaw*, 90 N. C. 337.

¹² *Stribling v. Prettyman*, 57 Ill. 371.

¹³ *Morris v. Beebe*, 54 Ala. 200; *Reay v. Butler*, 69 Cal. 572; *Hill v. Atterbury*, 88 Mo. 114; *Jackson v. Allen*, 30 Ark. 110.

¹⁴ *Sutton v. Casseleggi*, 77 Mo. 397.

¹⁵ *Dimick v. Deringer*, 32 Cal. 488.

¹⁶ *Merritt v. Thompson*, 13 Ill. 716.

lawyers as a sort of legal colloquialism. This use has been continued in the present work, and, with this explanation, it is thought that no confusion will result.

The term is sometimes given to all persons holding estates less than a fee, notwithstanding such estates may, in fact, be freeholds, but it is particularly used in reference to those in the enjoyment of what are known as chattels real, that is, the holders of terms of years, or other estates less than freehold.

§ 156. **Tenants for years.**—It was a fundamental rule of the common law that a tenant for years, by the execution of a lease, acquired only a right of entry upon the demised lands,¹⁷ and until such entry had been made he could exercise no possessory rights with respect to same. For this reason it was early held that such tenant could not, before entry, maintain an action either of trespass or ejectment, because, as those actions complain of a violation or ouster of possession they could not be maintained by one who never had an actual possession.¹⁸ But this doctrine has been expressly rejected in the United States, where an estate for years is both created and perfected by the execution and delivery of a lease for the term, and such lease, while it confers no rights of ownership, does carry a right to the possession and profits of the land.¹⁹

As ejectment, in its essence, is still a possessory action, it follows that a tenant for years, with the term still unexpired, has a full and generally exclusive right to bring the action against any person who may invade his possession.²⁰ In fact, it will be remembered, the original purport of the action of ejectment was to enable a tenant for years who had been ousted to recover his term.

¹⁷ Technically called *interesse termini*.

¹⁸ 4 Bac. Abridg. 183.

¹⁹ Riddle v. Littlefield, 53 N. H. 510; Freer v. Stotenbur, 36 Barb. (N. Y.) 642.

²⁰ Hodgkins v. Price, 137 Mass. 13; Campbell v. Hunt, 104 Ind. 210, 2 N. E. 363; Tarpey v. Salt Co., 5 Utah, 205, 14 Pac. Rep. 338; Berrington v. Casey, 78 Ill. 317. In this case it was held that where a landlord leases land to

a tenant by a parol lease, and afterward, and before the tenant gets possession, leases the same land to another, who goes into possession, the first tenant may either bring an action of ejectment against the occupant to recover possession or may sue the landlord in assumpsit for a breach of the implied covenants for possession and quiet enjoyment.

§ 157. **Tenants at will.**—Where lands are let for an indefinite period, to be determined by the act of the parties themselves, the tenancy is said to be at will, and this, as usually understood, is the will of both parties. Such tenancy may originate by an express grant or may arise by implication from the circumstances connected with the entry or possession.²¹

The possession of a tenant at will is a legal one and he may bring ejectment against any person who invades it prior to its determination.²² So, on the other hand, as the estate is determinable at the will of the landlord the latter may bring the action against his tenant at any time after the term has expired, and it has been held that the bringing of an action of ejectment for the premises is itself a sufficient termination of the will.²³

§ 158. **Tenants from year to year.**—The inconveniences arising from the uncertainties of tenancies at will early gave rise to the creation of an estate, partaking of the qualities of estates for years and at will, which eventually came to be known as a tenancy from year to year. It was raised upon an implied contract for a year and was terminated only by a notice during the term. The new estate found great favor with the courts, which were ever inclined to make every indeterminate lease a holding from year to year, and so it finally became a recognized estate at common law and has been continued and confirmed by subsequent statutory enactments. It is initiated by any kind of a holding at will and receives its subsequent character by payments of rent or other circumstances tending to show a yearly tenancy.

Tenancies from year to year seem to have grown naturally out of the ancient doctrine of emblements, which entitled a tenant at will to the crops he had sown and gave to him a free ingress and egress to reap and carry them away after the determination of his tenancy by the landlord. It will readily be seen that land would be of very little value to the landlord while covered with crops belonging to his late tenant and subject to a right of entry to gather them, while to give the crops and

²¹ See *Jones v. Shay*, 50 Cal. 508; *Burns v. Bryant*, 31 N. Y. 453; *Goodenow v. Allen*, 68 Me. 308; *Rich v. Bolton*, 46 Vt. 84.

²² *Covert v. Morrison*, 49 Mich. 135.

²³ See *Blum v. Robertson*, 24 Cal. 127; *Chamberlin v. Donahue*, 45 Vt. 50.

such right of entry to a tenant at will was, in effect, to say that his enjoyment of the land was not affected simply by the determination of the landlord's will respecting his estate in it. But the distinction between the right of enjoyment and the right of estate was not very clearly drawn in the early days, and, because it was seen that the landlord could not arbitrarily put an end to the former, it was assumed that he was similarly restrained as to the latter. Hence, as early as the time of the year-books, we find holdings of this kind regarded as continuing occupations, requiring for their termination a reasonable notice to quit. It will further be observed that under the doctrine of emblements the tenant practically acquired all the profits of the land from the determination of the landlord's will, without paying any rent therefor. This was felt to be a hardship on the lessor, and so, in the interest of both parties a new species of continuous holding was created that could be terminated only by a reasonable notice. The tenant held the land as of right for the full period of the term but was charged with the duty of payment of rent and of surrender of the land at the expiration of the limit fixed by the notice. This notice, at a comparatively early period, became fixed at half a year, ending at a time corresponding to that at which the tenancy commenced. Thus the form of the tenancy became established and its convenience, no less than its inherent justice, has caused it to be continued and made a part of our own law.

It is a general rule that the reservation or payment of rent is essential to the creation and continuance of the estate,²⁴ and this reservation is the leading circumstance that turns leases for uncertain terms into leases from year to year,²⁵ but the estate may arise in a number of ways.

The rights of a tenant from year to year are much the same as those of a tenant for a definite term, and so long as his tenancy continues he may bring ejectment for an interference with his possessory rights.²⁶

²⁴ *Chamberlin v. Donahue*, 45 Vt. 50; *Dunne v. Trustees*, 39 Ill. 578; *Williams v. Derlar*, 31 Mo. 13; *Johnson v. Johnson*, 13 R. I. 467; *Coan v. Mole*, 39 Mich. 454; *Lockwood v. Lockwood*, 22 Conn. 425.

²⁵ *Herrell v. Sizeland*, 81 Ill. 457.

²⁶ *Berrington v. Casey*, 78 Ill. 317.

§ 159. **Tenants by sufferance.**—The estate held by a tenant by sufferance is the lowest known to the law and of such a precarious and uncertain character as to have no commercial value. It originated as an expedient of the courts to protect the rights of reversioners and remaindermen, and in its legal aspects differs but little from a trespass. Although not originating in tort the possession of the tenant is nevertheless regarded as tortious,²⁷ and his rights, as against any person invading his possession, are very similar to those of a trespasser.

§ 160. **Entry under void lease.**—There is some confusion if not positive disagreement in the authorities, with respect to the possessory rights of a tenant who enters under a lease which, for any reason, is inefficient to create or convey a term. It has been held in a number of instances, that where a tenant enters under a verbal lease for more than a year, and hence void by the statute of frauds, the transaction will still be construed as a valid lease for a year, while the acts of the parties in the payment and acceptance of rent may be sufficient to create a tenancy from year to year which can be terminated only after a notice to quit.²⁸ The better opinion, however, would seem to be that a lease void in itself is not effectual to vest any term whatever in the lessee, and even though possession is taken thereunder with the consent of the lessor, this, without some further agreement, evidences nothing more than a tenancy at will.²⁹ This tenancy at will, it is said, can be converted into a yearly tenancy only by a new contract, yet it does not seem that such new contract need be made in express terms but may be inferred from circumstances. Thus, a new contract may be implied by the payment and acceptance of an installment or aliquot part of a gross annual rent.³⁰ This would be evidence of a subsequent understanding or agreement, and, usually, without explanation to the contrary, would be of controlling effect.

²⁷ *Donnell v. Johnson*, 17 Pick. (Mass.) 266.

²⁸ *Rosenblat v. Perkins*, 18 Oreg. 156; *Swan v. Clark*, 80 Ind. 57; *Drake v. Newton*, 23 N. J. L. 111; *Strong v. Crosby*, 21 Conn. 389; *Martin v. Blanchett*, 77 Ala. 288.

²⁹ *Talamo v. Spitzmiller*, 120 N. Y. 37, 17 Am. St. 607; *McLeran v. Benton*, 73 Cal. 329; *Barlow v. Wainwright*, 22 Vt. 88; *Withers v. Larrabee*, 48 Me. 570; *Jennings v. McComb*, 112 Pa. St. 518.

³⁰ *Laughran v. Smith*, 75 N. Y. 209.

But, in any event, there must be something which tends to show that the creation of a yearly tenancy was within the intention of the parties; something occurring subsequent to the lease and from which new promises may be inferred.⁸¹

§ 161. **Forfeiture of tenant's rights.**—A violation of any of the covenants, or a breach of any of the conditions, under which a tenant enters will generally give to the landlord a right of election to forfeit the tenant's rights in the term. But courts are averse to enforce forfeitures and a waiver of such right will frequently be implied from slight circumstances.⁸² Thus, where a lease contains a condition of forfeiture in case the tenant underlets the premises without the written consent of the lessor, if, after such condition has been broken the lessor does any act which is clearly inconsistent with his reliance upon it, such as the acceptance of rent with a full knowledge of all the facts, such conduct amounts to a waiver of the condition, so far, at least, as to preclude the lessor from afterward availing himself of the forfeiture.⁸³ And, generally, if the lessor by words or acts induces or leads the lessee to believe that he will not enforce a forfeiture provided for in the lease, and the lessee, with that belief, continues to recognize the relation, the lessor will be estopped from setting up a breach or declaring a forfeiture.⁸⁴

VII. OFFICERS AND FIDUCIARIES.

§ 162. Trustees.

- 163. Executors and administrators.
- 164. Continued — Statutory powers.
- 165. Guardians.
- 166. Conservators and committees.

§ 167. Receivers.

- 168. Action by receiver in foreign jurisdiction.
- 169. Actions against receivers.
- 170. Assignee in bankruptcy.

§ 162. **Trustees.**—Under the application of the principle that only the legal title can be exhibited as a basis of claim in

⁸¹ *Dunn v. Rothermel*, 112 Pa. St. 272; *Talamo v. Spitzmiller*, 120 N. Y. 37.

⁸² *Williams v. Vanderbilt*, 145 Ill. 238; *Johnson v. Douglas*, 73 Mo. 168.

⁸³ *Moses v. Loomis*, 156 Ill. 392, 47 Am. St. 194; *Dahm v.*

Barlow, 93 Ala. 120; *Garnhart v. Finney*, 40 Mo. 449; *Hukill v. Myers*, 36 W. Va. 639; *Ireland v. Nichols*, 46 N. Y. 413.

⁸⁴ *Conger v. Duryee*, 90 N. Y. 594; *Brooks v. Rogers*, 99 Ala. 433; *McGlynn v. Moore*, 25 Cal. 384.

ejectment, it logically follows that a trustee, even as against the *cestui que* trust, may recover the lands affected by the trust, and the equities of the beneficial owner, however strong they may be, cannot prevail against the title thus asserted.³⁵ As the legal title of a trustee draws to it the possession of the lands, and as the beneficiary's right consists only of an ability to compel performance of the trust, there is nothing incongruous or inconsistent in this rule, and notwithstanding the tendency to merge legal and equitable rights, which, in many states, has become so manifest of late years, the general integrity of the rule has not been questioned.³⁶ The terms of the trust may to some extent modify the rule in its practical application, but, in general, the estate of the trustee is attended by the same legal incidents as if he were also the beneficial owner, and in all actions concerning the title the trustee is the proper party.³⁷

It will be understood, of course, that the foregoing remarks apply only where there is an active trust; where the trustee has some duty to perform in reference to the trust property, and where the trust itself has been properly created as required by law. If, for any reason, the trust is invalid, as where it rests in parol when the law requires a writing; or if it is merely a dry or passive trust which is executed by the statute, then, as the trustee takes neither title nor estate it follows that he can do no act that involves ownership, and having no title to the land can institute no action for its recovery.³⁸

So, also, when the only question involved is the right of possession, and the beneficiary is entitled thereto, it seems he may bring an action in his own name and maintain ejectment even as against the trustee.³⁹

³⁵ *Kirkpatrick v. Clark*, 132 Ill. 342; *Kirkland v. Cox*, 94 Ill. 400; *Devin v. Hendershott*, 32 Iowa, 192; *Beach v. Beach*, 14 Vt. 28; *Everett v. Drew*, 129 Mass. 150.

³⁶ *Presley v. Stribling*, 24 Miss. 527; *Clark v. Clark*, 8 Paige (N. Y.), 153; *Bennett's Appeal*, 46 Pa. St. 492; *Gunn v. Barrow*, 17 Ala. 743; *Cameron v.*

Phillips, 60 Ga. 434; *Philpot v. Lander*, 46 N. J. Eq. 318.

³⁷ *Richardson v. Friederltze*, 35 Mo. 266; *Farwell v. Rogers*, 99 Mass. 33; *Kirkland v. Cox*, 94 Ill. 400.

³⁸ *Ingham v. Burnell*, 31 Kan. 333.

³⁹ *Fernstler v. Seibert*, 114 Pa. St. 196.

§ 163. **Executors and administrators.**—As a general proposition neither executors nor administrators take any estate title or interest in the lands of the decedent whom they represent, and, having no interest therein, can maintain no action to perfect the title or relieve it of any burden.⁴⁰ But to this general proposition the statute, in some states, has made a number of exceptions, and judicial construction has tended still further to weaken the integrity of the ancient rule.

It must be understood, however, that the rule, as stated, refers only to executors acting under a naked testamentary appointment, in which event their powers are co-extensive with those of administrators, and they are bound by the same rules and subject to the same limitations. But, an executor may also be a trustee, and, when acting as such, his powers are measured by the terms of the will under which he is appointed. Under his testamentary authority he may do many things that would be beyond his power while merely performing the ordinary offices of an executor, and the rules which apply to trustees generally must be resorted to for the determination of the character of his actions.

Again, both executors and administrators, although clothed only with the ordinary powers for the settlement and distribution of their decedent's estate, may yet acquire such interest in the lands forming a part of said estate as will justify them in resorting to legal measures for the recovery of the possession or perfecting of the title thereto. As where an executor or administrator receives land in payment of debts due the estate, or has purchased same for the protection of the estate at an execution or judicial sale under a judgment belonging to the estate. Under such circumstances, while the land, in a proper sense, is held in trust for the persons beneficially interested, yet the legal effect of a conveyance to the executor or administrator is to vest in such person the entire legal title with all its incidents, including the right to possession. While the land thus purchased is regarded as a substitute for the judgment, mortgage, or other matter exchanged for it, and, takes the place of same for all practical purposes as between the executor or ad-

⁴⁰ *Ryan v. Duncan*, 88 Ill. 144; *Stuart v. Allen*, 16 Cal. 473.
Le Moyne v. Quimby, 70 Ill. 399;

ministrator and the parties beneficially interested, yet the land, so far as respects its custody, control and disposition, is the property of the officer. This being true it follows that he may maintain ejectment for its recovery when wrongfully withheld by another.⁴¹

Where the interest sought to be recovered is less than freehold, as where the estate involved is a term of years, no question as to the right of personal representatives to bring the action during the administration period can arise. While the next of kin or devisees, as the case may be, are entitled to the possession of the land on final distribution of the estate, yet before that time has arrived their rights are wholly expectant.

§ 164. Continued—Statutory powers.—In a number of states, where attempts have been made to assimilate the common-law doctrines of real and personal property and to reduce the divergent methods of descent and distribution to one uniform course of procedure, we may observe some marked departures from the rules which ordinarily govern in actions of ejectment. In these states the policy is to treat land much in the same manner as chattels and while the title of the ancestor vests in the heir at the moment of the ancestor's death, yet the possession and profits of same remain with the administrator until the final settlement of the estate. Where this rule prevails the statutory right of the administrator may be enforced by ejectment.⁴²

The respective relations of heirs and devisees with respect to the administrator or executor is not altogether well settled, but the general idea seems to be that the statute does not interfere with the descent of the land to the heir or the vesting of the legal title in the devisee, and, in some states it has been held that they may take possession or bring ejectment therefor against all persons except the administrator or some one in possession under him.⁴³ But, in all cases, it would seem that the

⁴¹ *Kunzie v. Wixom*, 39 Mich. 384.

⁴² See *Kline v. Moulton*, 11 Mich. 370; *McRae v. McDonald*, 57 Ala. 423; *Jones v. Billstein*, 28 Wis. 227; *Weeks v. Hahn*, 20

Cal. 621; *Buckner v. Chambliss*, 30 Ga. 652; *Barco v. Fennell*, 24 Fla. 378.

⁴³ *Marvin v. Schilling*, 12 Mich. 361; *Miller v. Hoberg*, 22 Minn. 249.

right of the administrator is sole, and exclusive of the right of the heirs. That is, that it is not a joint right, and that such right of possession, both as against the heirs and all other persons, continues until the estate is settled or the property delivered over by order of the probate court.⁴⁴ Under such a law the right to sue in ejectment follows as a necessary consequence, and in some states it has uniformly been held that, pending administration, the personal representatives alone may maintain the action.⁴⁵

§ 165. **Guardians.**—According to the common law there were four kinds of guardians, to wit: in chivalry, by nature, in socage, and by nurture. These distinctions, which grew out of the old feudal system, however much they may have served to influence modern legislation do not seem to have ever received a practical recognition in the United States. In all of the states the legislature has provided laws for the custody of the person of an infant and the control of his property, and it is this statutory guardianship only which figures in land titles or the litigation that may arise with respect thereto.

This statutory guardianship, however, would seem to be a direct out-growth of the common-law guardianship in socage, and in some cases specific reference is made thereto by the statute in defining the rights, powers and duties of the guardian. Guardianship in socage, under the English common law, existed only where an infant under the age of fourteen years was seized of land held in socage tenure. No person who could inherit from the infant was permitted to assume the office, which was given to such of the infant's next of kin as could not take by inheritance. In addition to the custody of the person of the infant the guardian in socage was regarded as possessing an estate in the infant's land, or at least such a title thereto as would enable him, in his own name, to maintain an appropriate action to recover damages for trespass and to recover possession of the land itself when wrongfully held by another.⁴⁶

⁴⁴ *Miller v. Hoberg*, 22 Minn. 249; *Agee v. Williams*, 30 Ala. 636; *Edwards v. Evans*, 16 Wis. 181; *Page v. Tucker*, 54 Cal. 121; *Barco v. Fennell*, 24 Fla. 378.

⁴⁵ *Chapman v. Hollister*, 42 Cal. 463; *Meeks v. Kirby*, 47 Cal. 168. But compare *Miller v. Luco*, 80 Cal. 257.

⁴⁶ See *Hutchins v. Dresser*, 26

The statutory guardianship, while to some extent based upon the ancient guardianship in socage,⁴⁷ has greatly enlarged the powers of the guardian in some particulars and restricted them in others. Thus, it has given to him the control and management of the personal as well as the real property of the ward; has extended the time limit of control to the age of twenty-one years, and entrusted such control to relatives who may inherit. But while a guardian in socage could maintain ejectment in his own name against any person who might deprive him of the possession of the ward's lands, it does not seem that this right has been preserved under the statute as generally enacted, and notwithstanding the guardian has the control and management of the ward's land the technical possession thereof continues in the ward.⁴⁸ For personal property belonging to his ward the guardian is now permitted in some states to sue and recover in his own name for the use of the ward,⁴⁹ but the more generally observed rule is, that in all actions concerning the ward's property the suit should be entitled in the ward's name.⁵⁰ In any event, unless the power is given in express terms the guardian cannot maintain ejectment.⁵¹ This results, in some measure, from the rules which at present govern the action. It is generally provided that no person may recover in ejectment unless he has at the time of commencing the action a valid subsisting interest in the land claimed and a right to the possession thereof. If the statute does not in terms give the possession of the ward's lands to the guardian he is without such interest therein as will support an action for their recovery brought in his own name.⁵² On the other hand, if the statute expressly gives to the guardian the custody and control of all of the ward's property and invests him with full power for its management and protection, in other words, if it gives him the same powers and duties as a

Me. 76; *Foley v. Insurance Co.*, 138 N. Y. 333; *Hughes' Appeal*, 53 Pa. St. 500.

⁴⁷ *Emerson v. Spicer*, 46 N. Y. 594; *Snook v. Sutton*, 10 N. J. L. 133.

⁴⁸ *Muller v. Benner*, 69 Ill. 108; *Sallee v. Arnold*, 32 Mo. 532.

⁴⁹ *Longmire v. Pilkington*, 37 Ala. 296; *Melbane v. Melbane*, 66 N. C. 334.

⁵⁰ *Vincent v. Starks*, 45 Wis. 458.

⁵¹ *Muller v. Benner*, 69 Ill. 108.

⁵² *Muller v. Benner*, 69 Ill. 108.

guardian in socage, together with all the necessary legal remedies to accomplish these purposes, then, it may be, an action will properly lie in the guardian's name.⁵³

§ 166. **Conservators and committees.**—The powers and duties of a conservator or committee of a lunatic, drunkard, or other incapacitated person, differ but little from those of a general guardian of an infant. The incapacitated person is deprived of the right to manage his property or administer his affairs and all business relating to his estate must be transacted with the conservator. But the proprietary rights of the ward are not affected by such guardianship. It would seem, therefore, that this power of management gives a conservator no right to institute an action of ejectment for the recovery of his ward's lands, for with respect to them he is regarded as a mere bailiff acting under the direction of the court which appointed him. Having neither title to nor estate in the lands he is precluded from bringing any action based on personal interest, and should the possession be invaded it can be recovered only in the name of the *non compos*.⁵⁴

§ 167. **Receivers.**—A receiver is an officer of the court appointing him, and acts under its orders and directions. He has no powers other than those conferred upon him by the order of appointment, and can legally do nothing beyond their scope.⁵⁵ As a general rule, personal estate becomes vested in him by virtue of his appointment, but real estate only by a conveyance to him, which the court has power to compel.⁵⁶ It is sometimes asserted by the elementary writers, that the mere appointment of a receiver operates as a transfer to him of the real as well as personal property involved in the litigation, but this is fundamentally opposed to all of the principles of conveyancing. The statute may effect such a transfer in proper cases, but, independently of statute, a receiver obtains no title to lands by virtue of his appointment only, nor unless he shall become so vested by a conveyance.⁵⁷ By his appointment he

⁵³ See *Torry v. Black*, 58 N. Y. 188.

⁵⁴ *Petrie v. Shoemaker*, 24 Wend. (N. Y.) 85; *Allen v. Ransom*, 44 Mo. 263.

⁵⁵ *Hooper v. Winston*, 24 Ill. 353.

⁵⁶ *Chautauqua Bank v. Risley*, 19 N. Y. 370; *Union Trust Co. v. Weber*, 96 Ill. 346.

⁵⁷ *Union Trust Co. v. Weber*,

may become authorized to take and hold possession of real property, and to receive the rents and profits thereof, but his possession is only that of the court. And even where by conveyance he becomes clothed with the legal title he is not a purchaser, in the ordinary meaning of the term, but holds the title and possession as an officer of the court for the benefit of all parties in interest.⁵⁸

But where the order provides only for the sequestration of the rents and profits of land no question of title is involved. Under such order he would be entitled to possession as against the parties to the action, and all claiming under them, but his possession, in any event, would be the possession of the court, and his powers would be limited to such acts as the court should specially authorize or direct.⁵⁹ Hence, he would have no right to bring an action of ejectment without special leave of court, nor to otherwise litigate the title.⁶⁰ He might, by permission, institute proceedings to compel the surrender of possession to him, either against the parties to the action in which he is appointed or against a stranger claiming adversely, but his right would still be confined to possession for the purpose of securing the rents and profits, and if there should be no interference with him in the exercise of this power, he would have no concern with the title or interest in the determination of adverse claims, if any such there were.⁶¹

It is also a fundamental maxim that a receiver can maintain an action only in those cases where the debtor could have so done had there been no receiver.⁶² This follows from the fact that the receiver derives whatever interest he may possess from the debtor, and if the debtor was without title or right of entry his deed to the receiver would be a mere nullity.⁶³ In most of the cases in which this doctrine has been announced the sub-

96 Ill. 346; *Foster v. Townshend*, 68 N. Y. 203.

⁵⁸ *Union Trust Co. v. Weber*, 96 Ill. 346.

⁵⁹ *Reynolds v. Pettyjohn*, 79 Va. 327; *Sawyer v. Harrison*, 43 Minn. 297; *Manlove v. Burger*, 38 Ind. 211; *Screven v. Clark*, 48 Ga. 41.

⁶⁰ *Foster v. Townshend*, 68 N. Y. 203; *Union Trust Co. v. Weber*, 96 Ill. 346.

⁶¹ *Foster v. Townshend*, 68 N. Y. 203.

⁶² *La Follett v. Aiken*, 36 Ind. 1; *Republic Ins. Co. v. Swigert*, 135 Ill. 150.

⁶³ *Republic Ins. Co. v. Swigert*, 135 Ill. 150.

ject-matter has been chattels or proprietary rights relating to personalty, but the principle is not limited to any class of property and applies to land as well as to chattels.

A receiver will sometimes be appointed pending an action of ejectment to take charge of and harvest the crops growing upon the land in dispute,⁶⁴ but this is a practice not warranted by the principles of the action and depends upon local statutory policy.

§ 168. **Action by receiver in foreign jurisdiction.**—It is still a mooted question as to whether a receiver shall be permitted to sue in a foreign jurisdiction for the recovery of property belonging to or claimed to be a part of his trust estate. It is conceded that he is wholly without right so to do; that he has no extra-territorial power, and that his appointment does not entitle him to recognition by the courts of a foreign state.⁶⁵ In the earlier cases this doctrine seems to have been rigorously adhered to, and that which he could not claim as of right the courts declined to grant as an act of grace;⁶⁶ and it is still contended in some quarters that as he is the coercive creature of a different forum, neither under the supervision of nor accountable to the courts of a foreign state, it is contrary to public policy to confer upon him the rights of a resident suitor in the courts of such state to the prejudice of a citizen.

The tendency of the more recent cases, however, is to permit the maintenance of suits by foreign receivers, where the rights of domestic creditors are not involved and when such suits do not injuriously affect the interests of the citizens.⁶⁷ The privilege is distinctly an act of comity, and, like all concessions of this kind, is not granted when inimical to public policy or contrary to law. While such suits are generally brought for the recovery of chattels or for the establishment of rights con-

⁶⁴ See *Bitting v. Ten Eyck*, 85 Ind. 360.

⁶⁵ *Rhawn v. Pearce*, 110 Ill. 350; *Filkins v. Nunnemacher*, 81 Wis. 91; *Brady v. Connelly*, 52 Mo. 19; *Catlin v. Silver Plate Co.*, 123 Ind. 477; *Hazard v. Durant*, 19 Fed. Rep. 471.

⁶⁶ *Booth v. Clark*, 17 How.

(U. S.) 322; *Insurance Co. v. Needles*, 52 Mo. 17.

⁶⁷ *Patterson v. Lynde*, 112 Ill. 196; *Mentzner v. Bauer*, 98 Ind. 427; *Gilman v. Ketcham*, 84 Wis. 60; *Boulware v. Davis*, 90 Ala. 207; *Bagby v. Railroad Co.*, 86 Pa. St. 291; *Hurd v. Elizabeth*, 41 N. J. L. 1; *Comstock v. Fredrickson*, 51 Minn. 350.

nected with personal property, it would yet seem that they may be brought for the recovery of real property as well.⁶⁸

§ 169. **Actions against receivers.**—It was early held that any attempt, by a person having an outstanding right or title, to disturb the possession of a receiver, is a contempt of court, and before a suitor could bring an action of ejectment for the recovery of lands so held it became necessary to obtain the permission of the court of chancery.⁶⁹ This rule has not been materially changed in modern practice and a receiver appointed by judicial authority cannot, in the absence of statute, be subjected to suit without leave of the court whose officer he is, which must be granted in the cause in which he was appointed.⁷⁰ The rule is based on the principle that the possession of a receiver is the possession of the court, and any unauthorized interference therewith, either by taking forcible possession of the property committed to his charge, or by legal proceedings for that purpose, without the sanction of the court appointing him, is a direct and immediate contempt of the court.⁷¹

Of late years, however, there have been some marked changes in the ancient rule above stated, particularly with respect to receivers appointed by the federal courts. By act of Congress,⁷² a receiver appointed by any court of the United States may be sued in respect of any act of his own without previous leave of court, and, presumably, this is broad enough to permit an action of ejectment where a receiver has entered into possession of land claimed by one not a party to the receivership suit. It has been held that the effect of the act is to abrogate the rule that a receiver cannot be sued without leave of the court appointing him, and gives to the citizen an unconditional right to bring his action in any proper court and to have the justice of his demand determined by a jury.⁷³

⁶⁸ *Small v. Smith*, 14 S. Dak. 621, 86 Am. St. 808, 86 N. W. Rep. 649.

⁶⁹ *Angel v. Smith*, 9 Ves. (Eng.) 335.

⁷⁰ *Links v. Conn. River Bkg. Co.*, 66 Conn. 277, 33 Atl. Rep. 1003; *Little v. Dusenberry*, 46 N. J. L. 614; *Keen v. Brecken-*

ridge, 96 Ind. 69; *Melendy v. Barbour*, 78 Va. 544.

⁷¹ *Richards v. The People*, 81 Ill. 551.

⁷² Act of March, 1887, 25 Stat. at Large, 436.

⁷³ *Gableman v. Peoria, etc. Ry. Co.*, 179 U. S. 335.

§ 170. **Assignee in bankruptcy.**—At the present writing a National Bankrupt Act is in operation, which, by its terms, supersedes all state laws relating to insolvency. Many features of the present law are obscure, but it would seem that when a trustee is appointed he becomes vested, by operation of law, with the bankrupt's title, although the court may order such conveyance as may be necessary to effect this purpose. The act further provides for the maintenance of suits by the trustee against adverse claimants of the bankrupt's property, and under this authorization it would seem that the trustee may bring actions of ejectment to recover possession and determine title.

It has frequently been held that an assignee in bankruptcy does not take the title to the property of the bankrupt as an innocent purchaser for value, but as a mere volunteer, standing in the shoes of the bankrupt, as respects the title, and having no greater rights in that respect than the bankrupt himself could assert.⁷⁴

With respect to the *status* of a receiver or trustee in bankruptcy as defendant in ejectment proceedings there is a dearth of authority. The exclusive nature of the bankruptcy proceeding, as well as the character of the relief which it affords, has no analogy in other departments of the law, and, usually, the courts to which the jurisdiction has been committed are very jealous of intrusion or outside interference. It has been held that where a trustee has taken possession of buildings containing the bankrupt's stock ejectment will not lie against him by the owner of the building; but the latter will be compelled to resort to the bankruptcy court for a remedy.⁷⁵

VII. MUNICIPALITIES.

§ 171. The United States.	§ 173. The State.
172. Officers of the United States.	174. Counties.
	175. Cities and towns.

§ 171. **The United States.**—A different rule prevails whenever the Federal Government is sought to be made a party to a legal proceeding from that which applies to controversies

⁷⁴ *Hardin v. Osborne*, 94 Ill. 571; *Walker v. Miller*, 11 Ala. 1067. ⁷⁵ *Deweese v. Reinhard*, 165 U. S. 386.

between citizens. It is a fundamental principle that the government cannot be sued, except by its own consent, and such consent can be manifested only by an act of Congress.⁷⁶ This principle underlies all the authorities relating to the jurisdiction of courts and is a necessary attribute of sovereign power. From this principle it logically follows that no state can pass a law, which will have any validity, making the United States suable in its courts.⁷⁷

As an extension of the principle it has been held, that as the possession of the government can exist only through its officers, using the phrase in the sense of any person charged on behalf of the government with the control of its property, coupled with actual possession, it necessarily follows that such officers may not be made defendants in suits brought to recover the possession of lands in their occupancy. In other words, that the rule which prohibits a direct proceeding against the government,⁷⁸ operates with the same force and effect when its officers are made parties, and that state laws which provide that judgments in ejectment shall work an estoppel, binding the parties and all persons in privity with them, have no application in cases of this kind. Should such a suit be brought it will be unavailing, for when it becomes apparent from the pleadings or the proofs that the possession sought to be assailed is, in fact, the possession of the government, the jurisdiction of the court ceases. Were the rule otherwise, say the authorities, the government could always be compelled to come into court and litigate with private parties in defense of its property.⁷⁹

⁷⁶ Carr v. United States, 98 U. S. 433; United States v. Lee, 106 U. S. 196. "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and general practice of mankind." The Federalist, No. 81.

⁷⁷ Carr v. United States, 98 U. S. 433.

⁷⁸ Congress has created a court in which it has authorized suits to be brought against the United

States, but has limited such suits to those arising on contract, with a few unimportant exceptions.

⁷⁹ Carr v. United States, 98 U. S. 433. In this case it was held that the cases in which the property of the government may be subjected to claims against it are those in which the property is in juridical possession by the act of government itself, or has become so without violating its possession, and it seeks the aid

But the proposition last stated has not gone unchallenged and while it may still apply to suits involving the possession of chattels it has been denied when the subject-matter is land. This phase of the proceeding will form the substance of the succeeding paragraph.

§ 172. **Officers of the United States.**—While we must concede the absolute integrity of the main proposition of the last paragraph, to wit: that the United States cannot lawfully be sued in any case without its consent, we may yet pause to inquire whether the further proposition, that no action can be maintained against an individual without such consent, where the judgment must depend upon the right of the United States to property held by such person as an officer of the government, is a necessary or proper deduction from the proposition first stated.

The later cases, both state and Federal, strongly tend to minimize the earlier doctrines of sovereignty, which were borrowed, to a large extent, from the political and judicial policy of Great Britain.⁸⁰ The result of this has been to modify the doctrine of the second proposition above stated and to permit suits against the officers of government.

of the court to establish or reclaim its rights therein. In such case it is equitable that the prior rights of others to the same property should be adjudicated and allowed. Obviously this applies mainly to chattel property. See the cases of *The Siren*, 7 Wall. 152, and *The Davis*, 10 Wall. 15.

⁸⁰ From the time of Edward I until the present, the King of England has not been suable in the courts of that country, except where his consent was given on petition of right, although it is a matter of great uncertainty whether prior to that time he was not suable in his own courts and in his kingly character, the same as other persons were. But after the establishment of the petition of right, as the ap-

propriate manner of seeking relief where the ascertainment of the parties' rights required a suit against the king, no suit was permitted to lie against the king, except as allowed on such petition.

In this country there is no such thing as the petition of right, as there is also no such thing as a kingly head to the nation, nor to any of the states which compose it. There is vested in no officer or body the authority to consent that the state shall be sued, except in the law-making power, which may give such consent on any terms it may see fit to impose. (*The Davis*, 10 Wall. 15.) Many of the reasons which forbade that the king should be sued in his own court do not apply to the

It would now seem to be the received rule, that in all cases where jurisdiction depends on the party, it is the party named in the record, and where the right is alleged to be in the plaintiff and the possession in the defendant, the inquiry cannot be stopped by the mere assertion of title in the sovereign.⁸¹ In deciding who are parties to a suit the court has no right to look beyond the record. It is immaterial that the defendant is an officer of the government. Making him a party does not make the government a party, notwithstanding that it may stand behind him as the real party in interest.⁸² In such a case the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable by the court, while it is further presumed, in favor of the jurisdiction of the court, that the plaintiff may be able to prove the right which he asserts in his declaration. If the plea shows that the defendant is in possession as an officer of the United States and alleges title in the government the court does

political body corporate we call the United States, nor can it be said that the dignity of the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts and submitting its rights, as against the citizens, to their judgment. In one case it was said that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties by the sovereign to subject him to repeated suits as a matter of right, at the will of the citizen; and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury. (*Briggs v. Light Boats*, 11 Allen (Mass.), 162.) Yet, as we have no person in our government who exercises supreme executive

power or performs the public duties of a sovereign, it is difficult to perceive on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted by our courts as a part of the general doctrine of publicists, that the supreme power in every state, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts. See *United States v. Lee*, 16 Otto (U. S.), 196; *Chisholm v. Georgia*, 2 Dall. (U. S.) 419.

⁸¹ *Osborn v. Bank*, 9 Wheat. (U. S.) 738; *Polack v. Mansfield*, 44 Cal. 36; *Tindal v. Wesley*, 167 U. S. 204; *Scranton v. Wheeler*, 113 Mich. 565.

⁸² *Davis v. Gray*, 16 Wall. (U. S.) 220; *King v. Lagrange*, 61 Cal. 221; *Jackson v. Wilcox*, 1 Scam. (Ill.) 344; *United States v. Lee*, 16 Otto (U. S.) 196.

not thereby lose jurisdiction. On the contrary such a plea presents an issue, which the court is bound to try, the same as any other issue in the case.⁸³ If the facts alleged are proved upon the trial they constitute a defense to the action, but it seems like a denial of justice to say that however clear the plaintiff's rights may appear no remedy can be afforded him when his opponent is an officer of the United States and is claiming to act under its authority.

The conclusion, therefore, to be drawn from the adjudged cases would seem to be: that the government cannot be sued without its consent, although it may maintain an action against any one else whether he consents or not; that a person who claims title to land in the possession of the United States cannot have his right finally determined in any other way than by bringing an action of ejectment against the officer in immediate possession of the demanded premises and recovering judgment against him; that when any one in the actual possession of property defends his right of possession upon the ground that the government, state or national, has placed him in possession, he must show that the right of the government is paramount to the right of the plaintiff, or judgment will be rendered against him.⁸⁴

Such judgment, however, would constitute no bar to an action by the government to recover the same property back, nor would it preclude it from the assertion of any rights therein. The effect of judgments of this character, with respect to both the demandant and the defendant, as well as the government, is reserved for discussion in another part of the work.⁸⁵

§ 173. **The state.**—It was formerly doubted, in England, whether an ejectment could be maintained by the king, because ejectment is for an injury done to the possession of lands, and the king could not be put out of possession.⁸⁶ The same idea seems to have been retained in this country after the institution of the present government, and a number of early cases may be found wherein it is held that a state cannot maintain eject-

⁸³ *King v. Lagrange*, 61 Cal. 221; *Scranton v. Wheeler*, 113 Mich. 565. 204, *Scranton v. Wheeler*, 113 Mich. 565, 67 Am. St. 484.

⁸⁵ See § 499, *infra*.

⁸⁴ *Tindal v. Wesley*, 167 U. S.

⁸⁶ *Adams, Eject.* 79.

ment, or other action to try the title to land, for the reason that a state cannot be disseized. The remedy, in case of a trespass of any kind, was held to be by information for intrusion.⁸⁷ But this rule, if it ever was a rule, does not appear to have received a general recognition, while the right of the state to sue in ejectment was declared by the statutes of many of the states at about the time of the change of the action to its modern form. By these statutes every action brought by the state, or in the name of the people, might be prosecuted in like manner as if such action had been commenced by an individual. In cases of escheat or forfeiture it would seem that *quo warranto*, or some, action of that nature, should be employed, but even escheats have been permitted to be recovered by ejectment.⁸⁸ In all other cases ejectment is the proper remedy where the state claims title to land in the possession of another.⁸⁹

As a party defendant the state occupies much the same position as the United States, and may not be sued in its own courts without its consent.

§ 174. **Counties.**—The county is an integral part of the state; one of its subdivisions for local governmental purposes. Its essence is that of the state and in many respects the general rules of law do not apply to it. It rests on a different footing from individuals and private corporations, and from municipal corporations proper, such as cities and towns acting under charters or incorporating statutes.⁹⁰ The powers of a county, as a body politic, can be exercised only through its board of supervisors, and, usually, actions against the county are prosecuted in the same manner.

§ 175. **Cities and towns.**—The authorities are not in accord with respect to the right of a city or municipal corporation to bring ejectment for public ways. On the one hand, it has been held that a city has not such a valid substituting interest in the lands embraced in its streets as will authorize it to

⁸⁷ See *Jackson v. Winslow*, 2 Johns. (N. Y.) 80, dissenting opinion by Kent. Also *State v. Aredge*, 1 Bail. (S. C.) 551.

⁸⁸ In New York escheats might be recovered by ejectment as early as 1818. See laws of that

year, page 293. And see *People v. Denison*, 17 Wend. (N. Y.) 312; *People v. Livingstone*, 8 Barb. (N. Y.) 253.

⁸⁹ *State v. Shields*, 56 Ind. 521.
⁹⁰ *Symmonds v. Clay Co.*, 71 Ill. 355.

maintain ejectment therefor, and this disability is declared to be fundamental. Under these decisions the charter provisions giving a city supervision and control of its streets, confers only the power to care for them, keep them in repair, and to prevent and remove encroachments and obstructions.⁹¹ On the other hand, it is declared that a municipal corporation may maintain ejectment to recover possession of its streets, subject to the right of the citizens to pass and repass upon them as open highways.⁹² Where the fee of the street is vested in the city or town the right to maintain an action of ejectment against one who has intruded upon or occupies any part thereof does not seem to be doubted. But where the fee remains in the abutting proprietor, this, in a number of states, is held to constitute a technical objection to the successful prosecution of the action, and where this view prevails the general rule is that ejectment will not lie. The tendency, however, is to disregard objections of this kind and where the right to possession, use and control of public thoroughfares is vested in any of the municipal agencies of the state, this right is coming to be regarded as being in itself a sufficient ground on which to base an action of ejectment irrespective of whether the city has or has not the legal title to the way.⁹³ This subject is considered at length in another place.⁹⁴

With respect to other property it does not appear that the municipality is distinguished from the citizen.

⁹¹ See *Grand Rapids v. Whitteley*, 33 Mich. 109.

⁹² *San Francisco v. Sullivan*, 50 Cal. 603; *Lee v. Harris*, 206 Ill. 428, 69 N. E. Rep. 230, 99 Am. St. 176.

⁹³ *Lee v. Harris*, 206 Ill. 428; *Hoboken Land Co. v. Hoboken*, 36 N. J. L. 544; *Klinkener v. McKeesport*, 11 Pa. St. 444.

⁹⁴ See § 33 *et seq.*

CHAPTER VII.

THE PLEADINGS.

- I. BY THE PLAINTIFF.
- II. BY THE DEFENDANT.

I. BY THE PLAINTIFF.

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| § 176. General observations. | § 188. Double descriptions. |
| 177. The venue. | 189. Exceptions from the grant. |
| 178. The demise. | 190. Sufficiency of pleadings under the code. |
| 179. Continued — Equitable titles. | 191. Amendments. |
| 180. Continued — Equitable relief. | 192. Continued — Changing nature of action. |
| 181. Lease, entry and ouster. | 193. Joinder of actions. |
| 182. Allegations of possessory rights. | 194. Several plaintiffs. |
| 183. Character of ownership. | 195. Actions in official capacities. |
| 184. The estate claimed. | 196. Actions against receivers. |
| 185. Description of the premises. | 197. Claimants by hostile titles. |
| 186. Continued — Particulars of description. | 198. Exhibits. |
| 187. Description by reference. | |

§ 176. **General observations.**—Under the ancient practice the initiatory pleadings occupied a conspicuous place in the action of ejectment and the declaration was, for many purposes, regarded as a process of the court. Inasmuch as the parties were fictitious no writ could issue and it was by means of the declaration that the party in possession was informed of the claim made by the lessor.⁹⁶ The action was therefore commenced by the service of the declaration, which, in its technical details, was required to be explicit and strictly formal. The severity of the earlier rules continued to be relaxed, however, until the final abolition of the old forms of action and at pre-

⁹⁶ See §§ 6, 80, *ante*.

sent, in their general aspects, the pleadings are governed by the same rules and are subject to the same requirements that apply to pleadings in civil actions generally. The nature of the relief sought must, of course, influence their shape to some extent, but the ancient technical details are no longer of necessary observance, and even important defects may now be cured under the liberal provisions respecting amendments which are in force in every state.

The rules of pleading, whether at common law or under the codes, still require an orderly presentation of the facts relied upon to sustain the action and the declaration or complaint should be drawn with special reference thereto, in order that no variance may result upon the trial. The plaintiff's claim should be distinctly stated, and the character in which he sues as well as the extent of his interest should affirmatively appear. This latter rule, however, has been much relaxed of late years where the plaintiff is entitled to possession irrespective of the character of his interest, as where one of a number of tenants in common sues a stranger to the title, and is subject to some uncertainty growing out of conflicting decisions with reference to the extent of the recovery.

The old rule, that a pleading must be construed most strongly against the pleader, still applies, but has been greatly modified in most of the states with a view to substantial justice between the parties,⁹⁷ while after judgment the rule is generally reversed and the pleading construed in favor of the pleader and in support of the judgment.⁹⁸ But, while liberal intendments may be made in favor of the pleadings, yet courts cannot supply substance where it is lacking or overlook the omission of material averments;⁹⁹ the pleadings must still state a valid cause of action or ground of defense. No judgment can be rendered on evidence unsupported by allegations,¹ nor has the doctrine, that a defective pleading may be cured by verdict, any application where there is an entire absence of a material allegation.²

⁹⁷ *Jackson v. Jackson*, 17 Oreg. 110; *Schiffer v. Adams*, 13 Colo. 572.

⁹⁸ *Shahan v. Tallman*, 39 Kan. 185.

⁹⁹ *Mansur v. Streight*, 103 Ind. 358; *Gale v. James*, 11 Colo. 540;

George v. McCullough, 48 Neb. 680.

¹ *Thurmond v. Brownson*, 69 Tex. 597; *Abernathy v. Seagle*, 98 N. C. 553.

² *Richards v. Insurance Co.*, 80 Cal. 505; *George v. McCullough*,

The time of filing declarations is the same as in other actions at law, and the rules of practice in other actions apply to actions of ejectment, so far as they are adapted, except as the statute may otherwise specifically provide. Where the statute is silent the practice and rules of the common law govern.³

§ 177. **The venue.**—The general rule is, that an action to recover the possession of land must be commenced in the county wherein the land, or some part of it, is situated. In other words, the venue is local. Hence, the declaration or complaint should name the county and state in which the land in controversy is located,⁴ and a failure in this respect has been held sufficient to deprive the court of jurisdiction.⁵ But if there are two or more counts, and a general finding has been had, the judgment will not be disturbed because one of the counts is defective,⁶ while in some cases it has been held that even though the pleadings are defective in the matter of venue, yet, if a court of general jurisdiction, without objection, proceeds to judgment, it will be presumed after judgment that the land is in the county where the suit was commenced.⁷ It is also a general rule of construction that nothing can be more definite and certain than the description furnished by the government survey, and if lands are clearly and distinctly described in a pleading in a judicial proceeding, by reference to the section, township and range of the United States government survey, the court must take judicial notice of the county in which they are situated.⁸ If the land comprises a single tract lying partly within two counties; suit may be brought in either county.⁹

§ 178. **The demise.**—It is still customary for courts and writers to speak of the demise laid in the declaration, although,

48 Neb. 680; *Mansur v. Streight*, 103 Ind. 358.

³ *Williams v. Hartshorn*, 30 Ala. 211; *Mills v. Graves*, 44 Ill. 50; *Kitchen v. Wilson*, 80 N. C. 191; *Georgia Iron Co. v. Allison*, 116 Ga. 444; *Michigan C. R. Co. v. McNaughton*, 45 Mich. 87.

⁴ *Leary v. Langsdale*, 35 Ind. 74.

⁵ *Minkhart v. Hankler*, 19 Ill. 47.

⁶ *Minkhart v. Hankler*, 19 Ill. 47.

⁷ *Brown v. Anderson*, 90 Ind. 95.

⁸ *Rogers v. Cady*, 104 Cal. 288; *Smither v. Flournoy*, 47 Ala. 348; *Devine v. Burleson*, 35 Neb. 238.

⁹ *Barnes v. Underwood*, 54 Ga. 87.

as a matter of fact, no demise is alleged, the only statement being that on a day therein specified the plaintiff was possessed of the premises in question. This has taken the place of the old allegation of a lease which was required by the ancient practice, and for which it may be regarded as an equivalent. But the term has been so long in use and has acquired such a definite meaning as indicative of the time when title became or was vested in the plaintiff, that it will doubtless long remain, its convenience and great utility overcoming any objection to its somewhat fictitious character.

The statute providing for the averments of the declaration usually directs that the allegation of plaintiff's possession shall be laid as of some day certain, which shall be after his title accrued.¹⁰ This is important, for if the demise of the plaintiff is alleged as of a date prior to his having acquired title, there must, of necessity, be a variance when he comes to produce his proof.¹¹ These observations apply with increased force where title depends on limitation and possession, and not upon documentary evidence. In such a case care should be taken in stating the demise and the date should be laid on some day subsequent to the expiration of the full limitation period.¹²

Under the old practice the plaintiff, in stating the demise, necessarily showed, however, how he came into possession as well as the right by which he claimed, and while it would still be proper for a plaintiff to plead his title,¹³ yet, under the statute as now generally enacted, a simple averment of seizin and possession is sufficient without stating how he became seized.¹⁴

¹⁰ This provision was incorporated in the Revised Statutes of New York when the action was remodeled, and these statutes are the basis upon which the ejectment laws of nearly all the other states seem to have been erected. See R. S. N. Y., pt. 3, ch. 5. tit. 1.

¹¹ In *Pitkin v. Yaw*, 13 Ill. 251, the deed introduced to show title was dated January 4, 1851, and the declaration alleged title on June 1, 1850; *held*, a variance. To the same effect, *Holt v. Rees*, 44 Ill. 30, where the proof

showed that title was acquired August 22, 1865, while the declaration laid the date of the demise on May 3, 1865. And see *Foster v. Stapler*, 64 Ga. 766.

¹² *Schoonmaker v. Doolittle*, 118 Ill. 605.

¹³ *Ewing v. Cones*, 131 Ind. 600.

¹⁴ *Billings v. Sanderson*, 8 Mont. 201, 19 Pac. Rep. 307; *Wilmington, etc. Ry. Co. v. Garner*, 27 S. C. 50; *Hihn v. Mangenberg*, 89 Cal. 268; *Curtiss v. Livingston*, 36 Minn. 380.

It is generally essential, however, that there should be an allegation of ownership in order to recover from a defendant in actual possession, and notwithstanding that the declaration may recite the facts whereby the plaintiff claims title, yet if this material allegation is omitted the pleading will be insufficient.¹⁵ In addition to a substantial averment of ownership the declaration should also allege that the plaintiff is entitled to possession,¹⁶ and a failure to so allege, when required by statute, renders the pleading fatally defective.¹⁷ This has been held to be the case even in those states where the statute provides that the allegations of pleadings shall be liberally construed with a view to substantial justice.

There are modern decisions to the effect that if there is no demise from a particular person laid in the declaration, no recovery can be had based upon his title.¹⁸ But under the statute, as generally enacted, this feature of the ancient practice would seem to be wholly unnecessary and title, however acquired, may be shown under the general allegation of ownership.¹⁹

§ 179. Continued—Equitable titles.—In some of the states, particularly in those states where the distinction of law and equity has been ostensibly abolished, ejectment may be brought on strictly equitable titles. This is a complete reversal of the common law and a decided innovation upon the old rules. But where rights of all kinds may be tried in the same action there is, perhaps, no incongruity in permitting a demise to be laid upon an equitable title provided it be of such a character as to carry with it a right to present possession.²⁰ In such a case, however, it would seem that the facts showing title

¹⁵ *Schultz v. Hadler*, 39 Minn. 191, 39 N. W. Rep. 97. But see *Vance v. Schroyer*, 82 Ind. 116.

¹⁶ *Richards v. Crews*, 16 Oreg. 58; *Ashland Church v. Northern P. R. Co.*, 78 Wis. 131; *Simmons v. Lindley*, 108 Ind. 297. But see *contra*, *Tevis v. Armstrong*, 71 Tex. 59.

¹⁷ *George v. McCullough*, 48 Neb. 680, 67 N. W. Rep. 758;

Simmons v. Lindley, 108 Ind. 297.

¹⁸ See *Hobby v. Bunch*, 83 Ga. 1.

¹⁹ *Richards v. Smith*, 98 N. C. 509; *Pease v. Hannah*, 3 Oreg. 301; *Ewing v. Lutz*, 131 Ind. 361; *Billings v. Sanderson*, 8 Mont. 201, 19 Pac. Rep. 307.

²⁰ See *Hill v. Plunkett*, 41 Ark. 465; *Tobey v. Secor*, 60 Wis. 310.

must be specially pleaded,²¹ and that a recovery cannot be had upon allegations of a strictly legal title;²² or, as stated in some of the decisions, where a pleading in ejectment relies upon an equitable title it should contain, in substance, the elements of a bill in equity.²³

Except as permitted by statute, however, a person having the equitable title to land cannot recover in an action at law against the legal title, on the ground that it was acquired through either actual or constructive fraud. The legal title, in such case, must first be attacked and declared void by an action in equity.²⁴

§ 180. **Continued—Equitable relief.**—Under the modern codes of many states, legal and equitable relief may be administered in the same action, and in such states the declaration in ejectment may assume many of the features of a bill in chancery. Hence, it is permitted to have a reformation of deed and a judgment of ejectment in the same suit.²⁵ But where an effort is made to recover on a deed which misdescribes the land sued for, no evidence to correct the error of description will be admitted on the trial unless a proper ground therefor has been laid in the pleading. In such event it would seem that there must be an allegation of the mistake and a prayer for reformation. Without this the evidence should not be received.²⁶

Except as provided by statute, however, no equitable relief can be granted in an action at law, and allegations to this end are improperly inserted in an action to recover the possession of land.²⁷

§ 181. **Lease, entry and ouster.**—According to the former practice the demise stated in the declaration was the title under which the plaintiff was supposed to enter, and the ouster the supposed wrong for which the action was brought. The rules of pleading, as well as the form of proof thereunder, were

²¹ *Leatherwood v. Fulbright*, 106 N. C. 683, 14 S. E. Rep. 299; *McCauley v. Fulton*, 44 Cal. 355.

²² *Merrill v. Dearing*, 47 Minn. 137, 49 N. W. Rep. 693; *Groves v. Marks*, 32 Ind. 319.

²³ *Kentfield v. Hayes*, 57 Cal. 409. But see *Westfelt v. Adams*, 131 N. C. 379.

²⁴ *Walker v. Kynett*, 32 Iowa, 524; *Rountree v. Little*, 54 Ill. 323.

²⁵ In some states this privilege is also allowed to defendant. See *Nichols v. Shearon*, 49 Ark. 75.

²⁶ *Cain v. Hunt*, 41 Ind. 466.

²⁷ *Prentice v. Stearns*, 113 U. S. 435.

strikingly dissimilar from the practice in other actions, and quite technical in character. Although the demise was a fiction it was yet required to be consistent. The plaintiff was obliged to set forth a lease which might by possibility have been true, and the lessor was supposed to have the capacity for making a demise which should be valid and effectual not only at the time of the alleged delivery of the lease but also at the time of ouster and at the time of bringing the action.²⁸

The statute has expressly abolished all of the old forms of pleading and destroyed whatever significance they may have formerly possessed, and, as a rule, it is no longer necessary on the trial, for the defendant to confess, nor for the plaintiff to allege or prove, a lease, entry and ouster, or either of them,²⁹ except in actions by one or more tenants in common, or joint tenants, against their cotenants. But with respect to this latter class the old requirement, so far as same relates to ouster, is still in force, and a plaintiff, in such case, must allege and prove on the trial of the cause, that the defendant actually ousted him from the possession of the common property, or did some other act amounting to a total denial of his right as such cotenant.

It is still customary for the plaintiff to allege that the defendant entered and ousted him while seized and in possession of the land in controversy, and this must be regarded as the better practice. Such an allegation, together with proper averments as to description, time and place, is sufficient for most purposes of the action.³⁰ But under the liberal construction generally given to the pleadings it has been held sufficient if the declaration merely alleges that the defendant is in the unlawful possession of the lands and refuses to surrender.³¹

Where the statute provides for the substance of a pleading there must be a conformity to statutory directions, and averments couched in other language than that which the statute prescribes, have in some instances, been held insufficient.³² Lit-

²⁸ See *Doe v. Butler*, 3 Wend. (N. Y.) 154.

²⁹ *Brewer v. Beckwith*, 35 Miss. 467.

³⁰ *Billings v. Sanderson*, 8 Mont. 201; *Tetherow v. Chambers*, 74 Mo. 183.

³¹ *Speight v. Jenkins*, 99 N. C. 143; *National Bank v. Corey*, 94 Ind. 461; *Rego v. Van Pelt*, 65 Cal. 254.

³² Thus, an averment that defendant "unjustly withholds" is not equivalent to the allegation

eral conformity, however, will not generally be insisted upon if equivalent expressions are used,³⁵ and, generally, whether the action is against one in the actual possession of the land sued for, or against one exercising acts of ownership thereon, or claiming title thereto or some interest therein, the form of averment required in the declaration by the statute is the same.³⁴

§ 182. **Allegations of possessory rights.**—The extent and effect of allegations relating to the possession are now generally fixed and regulated by statute, and, when such is the case, the substantial requirements of the statute should be observed by the pleader. Thus, where the statute requires an affirmative allegation of right in the plaintiff it is not enough to state that the plaintiff is the owner in fee and that defendant wrongfully withholds possession. There must be a distinct allegation that plaintiff is entitled to the possession.³⁵ On the other hand, in the absence of a statutory direction of this kind it seems that no demand need be alleged nor proved, nor is the plaintiff required to allege that he is entitled to the possession.³⁶ But while it may be necessary to allege the right of possession it does not seem that the allegation should be in the exact words of the statute and a complaint deficient in this respect may yet be sufficient if from the language employed it clearly appears that a possessory right is claimed.³⁷ A total failure to allege that plaintiff is entitled to possession, or an absence of facts showing such right, is fatal to the complaint,³⁸ and the omission, being of an essential fact, is not cured by verdict.³⁹

required by statute that he "unlawfully withholds" them. *Osborne v. United States*, 3 N. M. 213, 5 Pac. Rep. 465.

³⁵ Thus, the omission of the word "unlawfully" will not vitiate a pleading if its equivalent in meaning is used. *Swaynie v. Vess*, 91 Ind. 585. As where the averment is that the defendant keeps the plaintiff out of possession "without right." *Smith v. Kyler*, 74 Ind. 581.

³⁴ *Dickerson v. Hendryx*, 88 Ill. 66.

³⁵ *Barclay v. Yeomans*, 27 Wis. 682; *Miller v. Shriner*, 87 Ind. 143.

³⁶ *McCaslin v. State*, 99 Ind. 428.

³⁷ *Swaynie v. Vess*, 91 Ind. 584; *Wilmington, etc. R. R. Co. v. Garner*, 27 S. C. 50.

³⁸ *Miller v. Shriner*, 87 Ind. 141.

³⁹ *Mansur v. Streight*, 103 Ind. 359.

The theory upon which the foregoing doctrine is founded is, that the plaintiff must recover on his own right, hence, it is not enough to allege that defendant's possession is without right, for even though it be conceded that the defendant has no right to the possession of the land in dispute, and that he unlawfully keeps the plaintiff out, yet the right of possession may be vested in a stranger to the record. For this reason it is contended that an assertion of possessory right is an essential averment and a neglect to insert it in the declaration or complaint is an omission of a fact essential to the plaintiff's cause of action.

§ 183. **Character of ownership.**—The plaintiff should allege and prove a legal seizin in himself, that is, he should show not only the specific degree of interest he may claim in the land but the right or authority by which he assumes to hold such interest. This he may ordinarily accomplish by a statement of the method of its acquisition, or, in other words, a deraignment of his title. Indeed, this becomes the vital point upon the trial, and hence it has been held that the declaration should be so framed as to clearly and unequivocally exhibit the title which is expected to support the claim.⁴⁰ A variance from the title alleged will be fatal to the maintenance of the action.⁴¹

But while the foregoing expresses the spirit of the general rule, and in many cases may still be applied under the principles of evidence which require that the proof must correspond to the allegations and be confined to the point in issue, yet under later statutes this strictness no longer prevails. As a general proposition a party may now allege a seizin of the entire premises and his action will not be defeated should he fail to prove that he was entitled to the entirety, provided he is able to show some lesser interest⁴² or title to a fractional part.⁴³ Some of

⁴⁰ See *Rowe v. Beckett*, 30 Ind. 154; *Barrett v. Hinckley*, 124 Ill. 32; *Marshall v. Palmer*, 91 Va. 344; *Taylor v. O'Neil*, 15 R. I. 198. But see § 190, *post*.

⁴¹ Thus, an allegation of title in A. is not supported by a deed to A. "and the other heirs at law of B.," without evidence that A. is the sole heir at law of B. *Cook v. Sinnamon*, 47 Ill. 214. And see *King v. Hyatt*, 51 Kan.

504; *Marshall v. Palmer*, 91 Va. 344; *Craig v. Taylor*, 6 B. Mon. (Ky.) 457; *Dawson v. Mills*, 32 Pa. St. 302; *Craig v. McBride*, 9 Dana (Ky.), 427.

⁴² *Marshall v. Palmer*, 91 Va. 344; *Gray v. Givens*, 26 Mo. 303; *Matthews v. Turner*, 64 Md. 109; *Jones v. Walker*, 47 Ala. 175; *Almond v. Bonnell*, 76 Ill. 536.

⁴³ *Matthews v. Turner*, 64 Md. 109.

the decisions have greatly extended this doctrine of relaxation in those cases where the gist of the action is the recovery of possession rather than the establishment of title, and it has been held that under the general allegation of seizin it is sufficient for the plaintiff to establish any interest in the premises which gives to him a right of possession.⁴⁴

But while a plaintiff may sue for all of the land and recover a moiety the converse of the rule does not hold good, and if he claims only an undivided interest it would be error to give him a judgment for the entirety.⁴⁵

It has been held that where a declaration or complaint fails to state the nature or extent of the interest which the plaintiff claims in the land in controversy, the objection cannot be reached by demurrer but should be presented by a motion to make the allegation more specific.⁴⁶ This, however, will depend much on local practice, for, usually, if a declaration or complaint is vague, uncertain or ambiguous the defect may be taken advantage of by demurrer.

§ 184. **The estate claimed.**—In every case, in the absence of statutory provisions to the contrary, it is necessary for the plaintiff to particularly state the nature and extent of the interest or estate claimed, whether in fee, for his own life, or the life of another, or for a term of years, and, in the latter instances, to specify such life or lives or the duration of the term. This rule, which has been very generally adopted, is ordinarily construed strictly, and a variance in the proofs, unless aided by statute, will usually defeat the action. Thus, where the plaintiff declares for a certain estate or interest in the land a different estate or interest cannot be shown by the proofs and recovered;⁴⁷ as, where the claim is for a fee, he cannot recover an estate for life or years;⁴⁸ he must recover

⁴⁴ As where the owner of an undivided one-half sues a trespasser or a stranger to the title for the exclusive possession of the entire tract. *Stark v. Barrett*, 15 Cal. 362.

⁴⁵ *Gamble v. Daugherty*, 71 Mo. 599.

⁴⁶ *Schenck v. Kelley*, 88 Ind. 445.

⁴⁷ *Winstanley v. Meacham*, 58 Ill. 97; *Lyón v. Kain*, 36 Ill. 362; *Gamble v. Daugherty*, 71 Mo. 599; *Hunt v. Campbell*, 83 Ind. 48; *Forsyth v. Rowell*, 59 Me. 181.

⁴⁸ *Ballance v. Rankin*, 12 Ill.

the fee, or nothing.⁴⁹ Again, if an undivided half interest is claimed, he cannot have judgment for all.⁵⁰

So, too, if the declaration fails to state any specific degree of interest, merely alleging a deprivation or detention of possession, it will be obnoxious to demurrer.⁵¹ To entitle him to a verdict the plaintiff must show an existing title in himself as well as a right to immediate possession,⁵² and the declaration should set forth his title, or the right whereof he claims, in terms so explicit that judgment in his favor will determine the character of his estate and not simply his right of possession.⁵³

But where the estate claimed is the fee, a simple allegation of seizin or ownership will generally be sufficient. This is particularly true where the fact of ownership is aided by a statutory presumption of right of possession.⁵⁴

§ 185. *Description of the premises.*—It would seem that in the earlier stages of the remedy, when ejectments were compared with real actions and arguments were drawn from analogy with them, a high degree of certainty was requisite in the description of the lands sought to be recovered, which was required to be so definite as to enable the sheriff exactly to know, without other information, of what to deliver possession. A review of the old cases, however, discloses the fact that while the rule of sufficient certainty was frequently invoked in general terms, yet in its practical application it was made to depend

420; *Almond v. Bonnell*, 76 Ill. 536; *Forsyth v. Rowell*, 59 Me. 131; *Hunt v. Campbell*, 83 Ind. 48.

⁴⁹ *Christy v. Pulliam*, 17 Ill.

59. But see §§ 190, 230, *post*.

⁵⁰ *Gamble v. Daugherty*, 71 Mo. 599.

⁵¹ *Goodall v. Henkel*, 60 Mich. 382; *Little v. Pherson*, 35 Oreg.

51. But see *Vance v. Schroyer*, 82 Ind. 116.

⁵² *Wells v. Steckelberg*, 52 Neb. 597.

⁵³ *Goodall v. Henkel*, 60 Mich. 382; *Taylor v. O'Neil*, 15 R. I. 198; *Cook v. Sinnamon*, 47 Ill. 214. It has been held, however, that notwithstanding the com-

plaint does not directly aver the ownership of the fee in the plaintiff, nor the right of possession, but does contain averments from which the inference is irresistible that such plaintiff has a subsisting interest in the land in dispute and is entitled to the possession, the complaint will be sufficient on demurrer. *Vance v. Schroyer*, 82 Ind. 116. And see *Lovely v. Speisshofer*, 85 Ind. 456, where it was held that if by the facts averred a title is shown, the complaint will be sustained.

⁵⁴ *Jones v. Memmott*, 7 Utah, 340, 26 Pac. Rep. 925.

more upon mere caprice than on principle, and from the difficulty which frequently attended attempts at specific designation the courts soon relaxed its severity. It would now seem to be the practice, in England, for the sheriff to deliver possession of the premises recovered according to the directions of the claimant, who therein acts at his own peril.⁵⁵

The relaxation of the ancient rule requiring certainty of description, although accounted by an eminent English writer⁵⁶ as one of the "salutory regulations which the wisdom of modern times has introduced into the action" does not seem to have been productive of good results in this country. It opened the way to numerous and vexatious applications to correct the errors of the sheriff in delivering possession, and courts were early obliged to formulate rules restricting the plaintiff, where a general verdict was rendered in his favor, to the taking possession of so much only as he gave evidence of his title to on the trial.⁵⁷ The earlier rule, which prevailed in England until about the middle of the eighteenth century, and which is better suited to our system of land parceling and methods of practice, has practically been reaffirmed by our courts and in many instances incorporated into our statutes, and may be considered an established principle of the action.⁵⁸

Under this rule it is necessary that the premises claimed shall be described with convenient certainty, so that, from the description given, possession thereof may be delivered.⁵⁹ This certainty has reference both to quantity and location,⁶¹ but if

⁵⁵ Adams, Eject. *23; Cottingham v. King, Burr (Eng.), 623.

⁵⁶ Adams, Eject. *24. Thus the declaration may describe the parcels as a "messuage, mill, garden, meadow, pasture, wood, heath, moor," or even as "so many acres of land," or a "house, stable," etc. See 2 Arch. Nisi Prius, 318.

⁵⁷ Seward v. Jackson, 8 Cow. (N. Y.) 427.

⁵⁸ Clark v. Clark, 7 Vt. 190; Jones v. Porter, 3 Pa. 132.

⁵⁹ Lenninger v. Wenrick, 98 Ind. 596; Orton v. Noonan, 18

Wis. 447; Griffin v. Hall, 111 Ala. 601; Turner v. Rives, 75 Ga. 606; Lazar v. Caston, 67 Miss. 275; Blow v. Vaughn, 105 N. C. 198; Livingstone County v. Morris, 71 Mo. 603; White v. Hake-man, 43 Mich. 267; Tracy v. Harmon, 17 Mont. 465.

⁶¹ Thus, where the plaintiff in his declaration described the land sued for as lying south of the west half of a given quarter section and between the south line of such quarter and a bayou, and the proof showed that his land lay south of the east half

the description given is such as would enable a competent surveyor to locate the land by referring to deeds, writings, or known objects, it will satisfy the requirements of the rule,⁶² the only test being that it shall be sufficiently definite to admit of proper ascertainment and identification.⁶³ Where, however, the description is so imperfect or incorrect that it is impossible therefrom to locate the land, a judgment founded upon it will be of no effect.⁶⁴

§ 186. Continued—Particulars of description.—A description by the section, township, range and meridian, will ordinarily be sufficient, since it follows the description adopted by the government in the original survey, and is as complete as can be required for any purpose,⁶⁵ although some authorities hold that the county and state in which the land is situated must also be designated.⁶⁶ The most that can be said, however, with reference to the statement of city, county or state is, that its insertion tends to greater certainty, yet the entire omission of this particular is of minor consequence, provided the section, town and range be correctly stated, as there can be but one locality answering that description.⁶⁷ The requirement of the statement of the county is a survival of the old ideas respecting real actions. Of course, in ejectment the venue must be local.

of the quarter section, it was held that this was a fatal variance, and that he could not recover. *McCormick v. Huse*, 78 Ill. 363. And see *Balliett v. Veal*, 140 Mo. 187, 41 S. W. Rep. 736.

⁶² *Lane v. Abbott*, 23 Neb. 489; *Sphung v. Moore*, 120 Ind. 352; *Hihn v. Mangenberg*, 89 Cal. 268.

⁶³ *Indianapolis, etc. Union v. Cleveland, etc. Union*, 45 Ind. 481; *Parr v. Van Horn*, 38 Ill. 226; *Livingston Co. v. Morris*, 71 Mo. 603; *Munson v. Munson*, 30 Conn. 425; *Hihn v. Mangenberg*, 89 Cal. 268; *Mills v. Traver*, 35 Neb. 292; *Ayers v. Reidel*, 84 Wis. 276.

⁶⁴ *Balliett v. Veal*, 140 Mo. 187, 41 S. W. Rep. 736.

⁶⁵ *Parr v. Van Horn*, 38 Ill. 226; *Louis v. Giroir*, 38 La. Ann. 723; *Mills v. Traver*, 35 Neb. 292.

⁶⁶ *Leary v. Langsdale*, 35 Ind. 74. But in a later case in the same state it was held that where the complaint does not disclose the county in which the land is situated and a court of general jurisdiction, without objection, proceeds to judgment, it will be presumed, after judgment, that the land is in the county where the suit was instituted. *Brown v. Anderson*, 90 Ind. 95.

⁶⁷ *Howe v. Williams*, 50 Mo. 252; *Beal v. Blair*, 33 Iowa, 318; *Slater v. Breese*, 36 Mich. 77.

In all cases of small parcels defined by metes and bounds, the land should be so described that in the event of a recovery the officer executing the writ of possession will know to what land the plaintiff is entitled;⁶⁸ but it would seem that if the property is exactly designated by references to location, character of improvements, methods of use, etc., this will be sufficient,⁶⁹ while if a tract is well known by a particular name it may be so de-

⁶⁸ *Livingston Co. v. Morris*, 71 Mo. 603; *Linniger v. Wenrick*, 98 Ind. 596. Thus, declarations for "a portion of a strip of land, ten rods wide, off from the west side" of a properly designated forty-acre lot, was held fatally defective, because it neither gave the length or width of the strip, nor so identified it that possession could be given in case of recovery. *White v. Hapeman*, 43 Mich. 267. So, too, where land was described as "the northeast part of the northeast quarter of . . . containing thirty-five acres." *Roberts v. Lanam*, 92 Ind. 380. Land described as "a part of the Joshua Wilson farm in sec. 15," etc., "containing forty acres," held an insufficient description. *Hammond v. Stoy*, 85 Ind. 457. Where no dimensions of the lot were given and no data was furnished from which they might be ascertained, the complaint was held demurrable for insufficiency. *Griffin v. Hall*, 111 Ala. 601. Recovery was denied on a declaration describing lands as "Part of a tract of two hundred and twenty acres, between Fort Creek and Shoulder Bone Creek, bounded on the north by lands of W. A., on the east by lands of R. and C., and on the south and west by lands said R." *Turner v. Rives*, 75 Ga. 606. And see *Lazar v. Caston*, 67 Miss. 275; *Blow v. Vaughn*, 105 N. C. 198.

A petition describing lands by metes and bounds commencing at "the S. E. corner of the N. W. $\frac{1}{4}$ of the N. $\frac{1}{2}$ " of a specified section, town and range, is sufficiently definite and certain without setting forth by some definite landmark or survey where such corner is situated. *Mills v. Traver*, 35 Neb. 292, 53 N. W. Rep. 67.

⁶⁹ A declaration described the premises as "a certain lot of land lying in the town of A., being the piece of land near the railroad depot in said town upon which defendant has erected a pump-house and appliances for the purpose of supplying its engines with water," held sufficiently certain. *Carter v. Railway Co.*, 26 W. Va. 644. So, also, where the complaint described the premises as "the house built by plaintiff for defendant on the Crandall farm, near the east line, in fractional section 13, township 4 south, and range 5 east, and the ground covered thereby." *Cunningham v. McCollum*, 98 Ind. 38. To the same effect, where lands were described as "a certain part of the S. E. of the S. E. section 29, range 6, township 8, containing two acres, more or less, including the meeting-house and camp grounds, with privilege of water during worship." *Rayburn v. Elrod*, 43 Ala. 700.

scribed.⁷⁰ This latter method, while permitted in some cases, is yet very unsatisfactory in that it necessarily requires a resort to extrinsic evidence to fix boundaries and location. Where the action is brought to recover possession of a part only of lands described or designated by a colloquial name, it will rarely be possible to frame a sufficiently certain description.⁷¹

In some cases a description by acreage, located in a part of a properly designated tract will be sufficient. But this will only occur in exceptional cases where the elements of certainty can be inferentially drawn from the description itself.⁷² In most cases such a description, standing alone, will be insufficient.⁷³

§ 187. **Description by reference.**—The methods of land parceling and conveyancing employed in this country at the time of its settlement, and for many years thereafter, were those in vogue in England. Our present admirable system of rectangular surveying was unknown, and whenever a survey was attempted, either for the purpose of locating a grant or to furnish a description of land conveyed, resort was necessarily had to the methods of the old trigonometrical systems. This occasioned long and complicated recitals of monuments, courses, distances, etc., and from motives of convenience these technical descriptions were avoided whenever a simpler device could be employed. One of these simple methods was to describe the abutments, another to name the last occupants, and still another to mention the character of the uses to which the

⁷⁰ *Hildreth v. White*, 66 Cal. 594; *Glacier, etc. Mining Co. v. Willis*, 127 U. S. 471, 32 L. Ed. 172.

⁷¹ Thus, a suit to recover land known as "a part of the Joshua Wilson farm, in section fifteen, township," etc., "containing forty acres," held an insufficient description. *Hammond v. Stoy*, 85 Ind. 457.

⁷² As where a description called for "the south part of sec. 5," etc., containing "225 acres," it was held that the description was not void for uncertainty,

but the land would be located by laying off 225 acres having the south, east and west sides of the section for boundaries, with the remaining boundary a line parallel to the south line of the section and sufficiently distant therefrom to include the requisite quantity. See *Tierny v. Brown*, 65 Miss. 113.

⁷³ A complaint describing the lands as "the N. E. part of" a designated section "containing 35 acres," was held bad on demurrer. *Roberts v. Lanam*, 92 Ind. 382.

land had been subjected. These were generally taken as sufficient for the purposes of a deed and, as a consequence, were also inserted in the pleadings whenever the title or right of possession was called in question.

There are decisions which support this kind of description where the references are capable of certainty in location but the practice is generally discouraged and recoveries of lands so described have often been denied.⁷⁴

Where land is described by reference to monuments it is not necessary to aver positively the existence of such monuments.⁷⁵

But, while evidence of extrinsic facts and circumstances is generally admissible to identify lands and to aid defective or imperfect descriptions in deeds, it must yet be remembered that the judgment in ejectment is for the land demanded in the declaration or complaint, and this should be so described that the judgment of the court, following the declaration, may be definite and certain. Hence, in cases similar to those now under consideration, that is, where parol evidence is necessary to identify the premises of a deed, the better practice is for the pleading to describe the land definitely by averring the facts that will be established by the extrinsic proof.⁷⁶

§ 188. **Double descriptions.**—It would seem that in the common-law action it was no objection to a description that the premises were twice demanded in the same demise. This was in conformity to the general rule that if the same count contained two demands, for one of which the action would lie, but not for the other, that all the damages should be referred to the good cause of action. The question arose mainly in connection with the peculiar descriptive terms of the English law, as where the action was brought for a "messuage and tene-

⁷⁴ See *Turner v. Rives*, 75 Ga. 606. A complaint describing lands as adjoining the lands of three persons named, and containing a certain number of acres, *held*, too vague to be explained by parol testimony. *Blow v. Vaughn*, 105 N. C. 198.

⁷⁵ Thus, where land is described as all that part of a de-

signed lot lying within one hundred feet on either side of a certain railroad track, it is no objection to the complaint that it does not positively aver that there is such a track on the land. *May v. Railroad Co.*, 26 Minn. 74.

⁷⁶ *Cottingham v. Hill*, 119 Ala. 353.

ment." The latter term, because it included many kinds of incorporeal hereditaments, was held to be uncertain as to what was intended to be demanded. These subtleties are, of course, without meaning in this country but the principle has been retained and is still applied.

An inconsistency is sometimes developed through an over anxiety of the pleader to identify the land, and this inconsistency generally grows out of the employment of particular and general descriptions. The usual rule seems to be, where there are two descriptions of the property, the one general and the other particular, and both cannot stand together, that the particular description will be adopted and the general one rejected.⁷⁷

§ 189. **Exceptions from the grant.**—Exceptions from the tract claimed should be described as particularly and concisely as the part sought to be recovered, the same general principles applying with equal force and effect in either case. If a specific quantity is excepted from the claim, it should be located with convenient certainty in order that it may be excluded from the delivery in case of a recovery, but courts are generally liberal in construing such descriptions and will make favorable, intendments for the claimant where the description can be properly fitted to the land.⁷⁸ If, however, the exception is of an undefined tract, referred to or designated merely by the name of its purchaser, it is fatally defective, and, because its extent cannot be ascertained from the description given it, renders the complaint incapable of supporting a judgment for the plaintiff as to any portion of the land sought to be recovered.⁷⁹

§ 190. **Sufficiency of pleadings under the code.**—As previously remarked, the tendency of modern decisions has been toward a relaxation of the stringent rules that formerly pre-

⁷⁷ *Inge v. Garrett*, 38 Ind. 96; *Case v. Dexter*, 106 N. Y. 548; *Barney v. Miller*, 12 Iowa, 460; *Sikes v. Shows*, 74 Ala. 382; *Hoggin v. Lorenz*, 15 Mont. 309.

⁷⁸ As where a complaint described lands sued for as a particular quarter section, "except two acres in the southeast cor-

ner," it was held good on demurrer, and the phrase construed to mean two acres in such corner lying in a square and bounded by four equal sides. *Green v. Jordan*, 83 Ala. 220.

⁷⁹ *Goodwin v. Forman*, 114 Ala. 489. And see *Lancey v. Brock*, 110 Ill. 609.

ailed. This is particularly true in states which have codes of procedure, and in a number of instances it has been held that, in respect to actions concerning rights in real property, a general allegation of ownership in a pleading is sufficient to admit proof of any legal title, general or special.⁸⁰ Hence, in ejectment, it is sufficient, under these decisions, for the plaintiff to allege that he is the owner and entitled to the possession of the land demanded, and that the same is wrongfully withheld, without alleging in detail the particular facts on which his claim of title is based.⁸¹ It is said that the rules which require the plaintiff to set up in his complaint the nature, quality and kind of ownership, are too narrow and technical for code pleading, and that the rule as first stated should prevail in all jurisdictions where the statute requires that the complaint shall contain a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition.⁸² The reasoning by which these decisions are supported proceeds upon the theory that ejectment is strictly a possessory action; that it is the "possessory title" which is important, and that, as plaintiff must show that he is entitled to immediate possession in order to recover, it is comparatively immaterial in what form his title may be.⁸³

The rule would seem to be the same under code pleading as under the common-law system with respect to pleading evidence, and a complaint or petition which sets up only the evidential facts instead of alleging ownership or right of possession, will generally be insufficient,⁸⁴ although in some states the rule is very much infringed.⁸⁵

⁸⁰ *McArthur v. Clark*, 86 Minn. 165, 90 N. W. Rep. 369, 91 Am. St. 333; *Brady v. Kreuger*, 8 S. D. 464; *Billings v. Sanderson*, 8 Mont. 201; *Johnston v. Pate*, 83 N. C. 110.

⁸¹ *Atwater v. Spaulding*, 86 Minn. 101, 90 N. W. Rep. 370, 91 Am. St. 331; *Garwood v. Hastings*, 38 Cal. 216; *Burt v. Bowles*, 69 Ind. 1; *Brady v. Kreuger*, 8 S. D. 464. And see *Johnson v. Crookshanks*, 21 Oreg. 339; *Northern Pac. R. R. Co. v. Lilly*, 6 Mont. 65.

⁸² *Atwater v. Spaulding*, 86 Minn. 101; *Caperton v. Schmidt*, 26 Cal. 479.

⁸³ See *Stuart v. Lowry*, 49 Minn. 91, 51 N. W. Rep. 662; *Johnston v. Pate*, 83 N. C. 110.

⁸⁴ *McCaughy v. Schuette*, 117 Cal. 223; *George v. McCullough*, 48 Neb. 680, 67 N. W. Rep. 758; *Schultz v. Hadler*, 39 Minn. 191. But compare *Carson v. Butt*, 4 Okla. 133.

⁸⁵ See *Lovely v. Speisshofer*, 85 Ind. 456.

As a general statement, it may be said, that the codes have not materially altered the fundamental rules of pleading however much they may have changed the form. If a party recovers in an action, it must be upon the case made by the pleadings. If the proof varies materially from the allegations of the pleadings it will be fatal to the action.

§ 191. **Amendments.**—It would seem to have been the practice in the earlier stages of the action not to permit amendments to the declaration, or at least not until the landlord, or tenant, had been made defendant instead of the casual ejector, and consequently, if the defects were such as to prevent the courts from granting the common rule for judgment against the casual ejector, the plaintiff's lessor was compelled to discontinue the action and resort to a new ejectment. The reason for this was, that the declaration being considered as the first process there was nothing preceding it to warrant an amendment.⁸⁶

This practice was subsequently modified so as to permit the lessor to amend his declaration before appearance, provided such amendment would work no injustice to the tenant. But, for a long time, even after appearance, the declaration could be amended in form only and not with respect to matter of substance. As it was extremely difficult, under the old practice, to indicate what errors were substantial, and hence not amendable, and as, under the strict rules by which the action was conducted, the demise, the term, the time of ouster, etc., were all considered as substance, much inconvenience was occasioned. This led to a more liberal policy by which the incidents just mentioned came to be regarded as formal only, and for the purpose of expediting the true justice of the case it became the practice to permit the plaintiff to add a new demise, when founded on the same title, and even to add new counts on another demise, and in many other ways to introduce matters of substance as well as form, and thus a practical freedom of amendment was finally permitted.⁸⁷

The modern remedy differs in no essential particular from other civil actions and the rules of pleading and practice which

⁸⁶ 2 Tidds, Prac. 1206; Adams, (N. Y.) 156; Jackson v. Tuttle, Eject. 200. 6 Cow. (N. Y.) 590; Taylor v.

⁸⁷ See Den v. Smith, 2 Pa. Taylor, 3 Marsh. (Ky.) 19. 710; Jackson v. Murry, 1 Cow.

obtain in actions at law generally will apply to the action of ejectment except as otherwise specially provided. This includes the right of amendment.⁸⁸ At the present time very liberal statutes of amendments and jeofails prevail in all of the states, and the court in which an action is pending has power to permit amendments in any process, pleading or proceeding in such action, either in form or substance. Under these statutes, at any time before final judgment, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or defendant, changing the form of action, and in any other matter which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought.⁸⁹ The adjudication of the court allowing an amendment is generally taken as conclusive evidence of the identity of the action.

§ 192. Continued—Changing nature of action.—But while the statute of amendments permits a change in the form of an action, allowing even so radical a departure as a substitution of tort for assumpsit, it does not, it seems, permit a change in its essential nature by introducing an entirely new cause of action.⁹⁰ Therefore, it has been held that plaintiff will not be allowed to amend his declaration so as to enable him, instead of recovering the land sued for, to have judgment for the amount paid by him at a foreclosure sale thereof, and for the sale of the land to repay such amount;⁹¹ neither can an ejectment be converted into an action of foreclosure.⁹² These things are too remote from the original cause of action to be engrafted upon it by amendment. So, too, a plaintiff in ejectment will not be permitted to so change his action by amend-

⁸⁸ *Dougherty v. Purdy*, 18 Ill. 206; *Schoonmaker v. Doolittle*, 118, Ill. 605; *Ludeman v. Hirth*, 96 Mich. 17; *Townsend Savings Bank v. Todd*, 47 Conn. 190; *Vreeland v. Ryerson*, 28 N. J. L. 205.

⁸⁹ See *Kennan v. Smith*, 115 Wis. 463; *Wallis v. Wilkenson*,

73 Md. 128; *Crosby v. Clark*, 132 Cal. 1.

⁹⁰ *Bank v. Shoemaker*, 117 Pa. St. 94; *Stevenson v. Mudgett*, 10 N. H. 338; *Connecticut Ins. Co. v. Kinne*, 77 Mich. 231.

⁹¹ *Hobby v. Bunch*, 83 Ga. 1, 20 Am. St. 301.

⁹² *Johnson v. Johnson*, 27 S. C. 309, 3 S. E. Rep. 606.

ment as to recover the value of the land instead of the land itself,⁹³ nor to make the case an action to redeem.⁹⁴ Where the claim of the plaintiff is changed by amendments of this character the effect is to substitute a new and different cause and kind of action, and this the courts are strenuous in declaring cannot be done.⁹⁵ So far has this doctrine been carried that an amendment has been refused where it would embrace more or different land from that described in the declaration, the contention being that such a course would be practically a statement of a new cause of action.⁹⁶

§ 193. **Joinder of actions.**—Modern codes have materially changed the old rules relative to joinder of actions and singleness of issue, and, with a view to prevent a multiplicity of suits, permit a plaintiff to unite several causes of action in the same complaint when they are of a congruous nature or grow out of the same transaction. As these codes have abolished all distinctions in pleading between actions at law and suits in equity, and provided but one form of action for the protection and enforcement of rights, it follows that both legal and equitable remedies may be administered in the same suit. About all that is required in the pleading is a statement of the facts on which relief is claimed, and when this is done such relief as is appropriate may be adjudged.⁹⁷

Where this practice prevails a claim of title and right of possession of land, with or without damages, may be joined in an action for waste, or for partition, or to quiet title.⁹⁸

§ 194. **Several plaintiffs.**—Where parties possess a community of interest the joinder of all in one complaint would seem to follow as a natural inference, but under the statute, as now generally enacted, the declaration may contain several counts and several parties may be named as plaintiffs even though their interests are not common, and this joinder may be made in one count or the interests may be stated separately.

⁹³ *Gas Light Co. v. Railroad Co.*, 51 Hun (N. Y.), 119.

⁹⁴ *Skinner v. Hodge*, 24 S. C. 165.

⁹⁵ *Morales v. Fisk*, 66 Tex. 189; *White v. Moss*, 67 Ga. 89;

St. Amand v. Long, 25 La. Ann. 164.

⁹⁶ *Robbins v. Harris*, 96 N. C. 557.

⁹⁷ *Terrell v. Frazier*, 79 Ind. 475.

⁹⁸ *Smith v. Kyler*, 74 Ind. 582.

It was formerly held that where several plaintiffs united in one action, if it appeared that one of the plaintiffs had no title to the premises sued for, a recovery could not be had in the action by the other plaintiffs, even if they had title,⁹⁹ and where the rule still obtains, that the recovery must be had upon the title declared for, this ruling would probably be sustained.¹ But the statute has abrogated much of the old strictness with respect to allegations and proof, particularly in actions of ejectment, and while it is still true that the proof should conform to the allegations yet it is no longer an objection to a recovery that any one of several plaintiffs is unable to prove any interest in the premises claimed. In such event those entitled may now have judgment, according to their rights, for the whole or such parts as he or they might have recovered if he or they had sued in his or their name or names only.²

In the absence of any statutory provision to the contrary the general rule would still seem to be that an allegation of joint interest must be substantially proved as alleged in the declaration, and that a mere showing of title in one or more, but not in all, is fatal to recovery.³

§ 195. **Actions in official capacities.**—Where the plaintiff sues as an officer or fiduciary the facts entitling him to maintain the action should be stated in the pleadings, together with a description of the official capacity in which he sues. Thus, where executors or administrators are permitted to sue in this form of action for the recovery of land belonging to the estate they represent, the declaration should set forth the nature and extent of the interest which the heirs or devisees of the deceased have in the premises claimed and that the plaintiff, as such executor or administrator, is entitled to the possession thereof, together with such other allegations as are necessary where the action is brought by one in his own right.

⁹⁹ *Murphy v. Orr*, 32 Ill. 489; *Whitlow v. Echols*, 78 Ala. 206.

¹ See *McGlamory v. McCormick*, 99 Ga. 148.

² This is statutory, but the text states the general statutory doctrine. And see *Walton v.*

Follansbee, 131 Ill. 147; *Miller v. Early*, 64 Mo. 478.

³ *Towns v. Mathews*, 91 Ga. 546; *Primm v. Walker*, 38 Mo. 94; *Tormey v. Pierce*, 42 Cal. 355; *Lynch v. Kirby*, 36 Mich. 238.

§ 196. **Actions against receivers.**—Land in the possession of a receiver is usually regarded as being in *custodia legis*, and before an action of ejectment can be brought for its recovery it is first necessary to obtain leave of the court which appointed the receiver. When such leave has been granted the action proceeds as in other cases. But inasmuch as the right to sue a receiver is a special privilege, and not an absolute right as in other cases, it is essential to the maintenance of the action that this privilege be affirmatively averred in the declaration, and the absence of an allegation showing that leave to bring the action has been granted will be fatal on demurrer.⁴

§ 197. **Claimants by hostile titles.**—The allowing joinder of parties and the union of causes of action, does not permit two persons, each of whom claims the whole of a tract of land by a title hostile to that of the other, to unite as plaintiffs in an action of ejectment against a third party who may be in possession, and it is immaterial whether the pleading sets forth the opposing titles in one or separate counts. Unless some common interest is shown, the allegations of title neutralize each other and the pleading would be bad on demurrer.⁵

§ 198. **Exhibits.**—It will rarely be necessary to file exhibits with a declaration in ejectment, and, as a general proposition, deeds or instruments constituting evidence of title are not the foundation of pleadings asserting title and should not be made exhibits. If they are so made they may be disregarded, and only the allegations of the pleading itself be considered.⁶ In no case will the recitals of an instrument annexed to a pleading be regarded as allegations of the facts recited,⁷ and notwithstanding that exhibits may be a part of the record, they yet form no part of the pleadings, nor can they be made so by annexation or by any prayer for the purpose.⁸

⁴ *Keen v. Breckinridge*, 96 Ind. 69; *St. Louis, etc. R. R. Co. v. Hamilton*, 158 Ill. 366.

⁵ *Hubbel v. Lerch*, 58 N. Y. 237.

⁶ *Smith v. Schweigerer*, 129 Ind. 363, 28 N. E. 696; *Howell v.*

Rye, 35 Ark. 470; *Youn v. Pittman*, 82 Ga. 637.

⁷ *Sprague v. Wells*, 47 Minn.

504, 50 N. W. 535.

⁸ *Perciful v. Platt*, 36 Ark. 456.

II. BY THE DEFENDANT.

§ 199. Pleas in abatement.	§ 208. Plea of title from common source.
200. Continued—Demurrers.	209. Former recovery.
201. Continued—Former action pending.	210. Denial of possession.
202. Pleas in bar—The general issue.	211. Disclaimer of title.
203. Theory of the general issue.	212. Inconsistent pleas.
204. Special pleas—Statute of limitations.	213. Continued—Special instances.
205. Plea of title.	214. Pleas since the last continuance.
206. Adverse possession.	215. Equitable defenses.
207. Extrinsic facts.	216. Estoppels.

§ 199. Pleas in abatement.—It would seem that in the old form of the action there were many technical difficulties in the way of pleas in abatement. Permission to file a dilatory plea of any kind was always required and the application was further required to be made within the first four days of the term next ensuing that of which the declaration was entitled. The proceeding seems to have involved much circumlocution, from the fact that the casual ejector and not the real party in interest was, during the time limited, the defendant, and the books are not very clear as to how the real defendant should bring himself before the court.⁹

At present the defendant may always demur to the declaration as in personal actions, and, generally, a plea in abatement may be interposed at any time before he has pleaded in bar, and the rules which govern the disposition of such pleas, as well as their effect if allowed, are the same as apply to other actions.¹⁰

§ 200. Continued—Demurrers.—Where the declaration fails to state a cause of action, or where there is a total omission of a fact essential to the plaintiff's case, a defendant is always at liberty to take advantage of such defects by demurrer. Thus, if the plaintiff fails to disclose the nature of his interest,

⁹ See Adams, Eject. *243, for a description of the procedure.

¹⁰ See Rouché v. Williamson, 25 N. C. 141.

or the quantity and quality of his estate;¹¹ or if he fails to aver that he is entitled to possession,¹² when by statute these allegations are prescribed as substance, the pleading will be obnoxious to demurrer. It has sometimes been held that statutory prescriptions need not be made in the exact words of the statute,¹³ provided the allegations are such as to show the statutory requirements by necessary implication, but, generally, where a specific formula is enjoined by law an omission thereof or a substantial deviation therefrom, will render the pleading bad on demurrer.¹⁴

§ 201. **Continued—Former action pending.**—The order and manner of pleading and the pleas that may be interposed, as well as the operation and effect of such pleas, are now largely regulated by statute, particularly in states which have codes of procedure and practice. As a general rule the pendency of a former action does not abate a second, and a plea thereof as a defense will be unavailing, unless both actions are founded upon the same cause. But, while this rule is usually strictly enforced, its practical application, in actions for the recovery of land, is not always free from difficulty. The test generally applied to determine the identity of causes of action is, whether the same evidence will support both.¹⁵ It is not enough that the property in controversy in both actions is the same;¹⁶ the very point in controversy, the question to be litigated, must be the same. Where this fact affirmatively appears, it would seem that a defendant should not be subjected to the expense and annoyance of contesting two actions, brought by the same person, for the recovery of the same land, and the pendency of the first action may be pleaded as a defense in the second.¹⁷ This seems also to be in consonance with the English cases during the earlier form of the action, for notwithstanding ejectment at common law determined no question of title and went

¹¹ *Clark v. Crego*, 47 Barb. (N. Y.) 599.

¹² *Mansur v. Streight*, 103 Ind. 358.

¹³ *Swaynle v. Vess*, 91 Ind. 584.

¹⁴ See *Miller v. Shriner*, 87 Ind. 141.

¹⁵ *Stowell v. Chamberlain*, 60

N. Y. 272; *Taylor v. Castle*, 42 Cal. 371; *Perry v. Foote*, 36 Conn. 102; *Propst v. Mathis*, 115 N. C. 526.

¹⁶ *Mandeville v. Avery*, 124 N. Y. 376.

¹⁷ *Dawley v. Brown*, 79 N. Y. 390.

only to the right of possession, thereby excluding the defense of a former judgment or action, yet where, during the pendency of an action, the plaintiff brought a second action for the same lands on the same title, the court would stay the proceedings in the second action until the first was discontinued.

It will often happen in ejectment suits brought for the recovery of the same land, that the evidence which would sustain one action will not support the other. Thus, the plaintiff may acquire a new and distinct title, and, having done so, may assert it without prejudice from another suit pending. He will be permitted to do this in the same manner that a stranger who had acquired same might have done, and such subsequently acquired title not being involved in the prior litigation will not be in any way affected by it. Therefore, a plaintiff may have two suits against the same defendant for the recovery of the same land pending at the same time, if the second is brought on a title acquired after the commencement of the first,¹⁸ and the circumstance that the two actions in all other respects are identical is immaterial.¹⁹

§ 202. **Pleas in bar—The general issue.**—The only plea in bar of the action of ejectment, in whole or in part, admissible at common law, is the plea of “not guilty,” and in the statutory form of the action preserved in the United States this rule is still of considerable efficacy. Special pleas in abatement may always be interposed, but, in some of the states, matters in bar of the action can be set up only under a plea of the general issue.²⁰ The reason for this seems to be traced back to the procedure when the “consent rule” was in force and to the fact that, under such procedure the claimant in the action was required to prove his right to the premises in dispute under this plea.²¹

¹⁸ Leonard v. Flynn, 89 Cal. 535.

¹⁹ Callahan v. Davis, 125 Mo. 27.

²⁰ See Reynolds v. Cook, 83 Va. 817; Nelson v. Brodhack, 44 Mo. 596; Stubblefield v. Borders, 92 Ill. 279.

²¹ Under the old practice it

seldom happened, by reason of the consent rule, that a defendant could plead any other plea than not guilty. The rule, in substance, is thus stated by Mr. Adams, writing during the early part of the last century. First, the person appearing consents to be made defendant instead of the

The statute, however, does not, as a rule, prohibit special pleas in bar but merely obviates their necessity by providing that the defendant may give in evidence any matter which may tend to defeat the plaintiff's action under the plea of the general issue. Where the statute is couched in mandatory terms no other plea will be permitted but even where the language is merely directory no other plea will, as a rule, be required. A general denial of the plaintiff's allegations will be sufficient to permit the introduction of any matters which may tend to substantiate such denial, as well as to impose upon the plaintiff the burden of proof of all affirmative facts necessary to establish his title and right to possession.²²

The effect of a general denial is that defendant denies the plaintiff's title and right of entry, and under this plea it would seem that any evidence is admissible which tends to show the invalidity of plaintiff's claim.²³

On the other hand under the provisions of the codes of procedure of some of the states, while the general denial puts in issue the plaintiff's title and imposes upon him the burden of proof, yet the defendant is precluded from giving evidence of

casual ejector. Secondly, to appear at the suit of the plaintiff; and, if the proceedings are by bill, to file common ball. Thirdly, to receive a declaration in ejectment, and plead not guilty. Fourthly, at the trial of the issue to confess lease, entry and ouster, and insist upon title only. Fifthly, that if at the trial the party appearing shall not confess lease, entry and ouster, whereby the plaintiff shall not be able to prosecute his suit, such party shall pay to the plaintiff the costs of the *non pros*, and suffer judgment to be entered against the casual ejector. Sixthly, that if a verdict shall be given for the defendant, or the plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry and ouster,

the lessor of the plaintiff shall pay costs to the defendant. Seventhly, when the landlord appears alone, that the plaintiff shall be at liberty to sign judgment immediately against the casual ejector, but that execution be stayed until the court shall further order. Adams, Eject. 233.

²² Fairbanks v. Long, 91 Mo. 628; Stubblefield v. Borders, 92 Ill. 279; Wood v. Eckhouse, 79 Ind. 354; Sparrow v. Rhoades, 76 Cal. 208, 9 Am. St. 197; Cheatham v. Young, 113 N. C. 161, 37 Am. St. 617; Wallis v. Wilkinson, 78 Md. 128; Black v. Tricker, 52 Pa. 436.

²³ Sparrow v. Rhoades, 76 Cal. 208, 9 Am. St. 197; Stocker v. Green, 94 Mo. 280, 7 S. W. Rep. 379, 4 Am. St. 382; West v. West, 89 Ind. 530.

any estate in himself, or another, in the lands in controversy, or any license or right to the possession thereof, unless the same shall have been specially pleaded, and where such provisions are in force the doctrines of the common law are superseded.²⁴ But this rule seems to obtain in but very few jurisdictions, and, generally, even in those states where the practice is regulated by a formal code of procedure, a recital by a defendant of his own title is no more than a denial of plaintiff's title, and opens the door no wider for the admission of evidence.²⁵ At most, it would seem that an allegation by a defendant of title in himself, is but a general denial in an argumentative form.²⁶

In every event, however, there must be some form of denial of the plaintiff's right;²⁷ in other words, there must be an issue presented to the trial court, and where the answer does not put the plaintiff's title in issue, it is unnecessary, if not useless, for him to introduce any evidence concerning it,²⁸ so, also, if a plea professes to answer the whole declaration, but in fact answers only a part, and there is no plea to the other parts of the declaration, the plaintiff may, at any time during the term, have judgment *nil dicit* for the parts unanswered.²⁹

§ 203. **Theory of the general issue.**—It will be seen, from the foregoing paragraphs, that there is considerable diversity, both of judicial opinion and statutory policy, respecting the efficacy and scope of the plea of the general issue, and that the effect to be accorded to it varies greatly in different states. To understand why it is, in itself, an all-sufficient plea in bar we must revert to the old action. There, it will be remembered, the technical issue always was, whether the defendant had wrongfully ousted the plaintiff, and in the modern remedy this

²⁴ See *Allen v. Higgins*, 9 Wash. 446.

²⁵ *Phillips v. Hagart*, 113 Cal. 552, 54 Am. St. 369.

²⁶ *Marshall v. Shafter*, 32 Cal. 192.

²⁷ *Rhoades v. Higbee*, 21 Colo. 88.

²⁸ *Gregory v. Forbes*, 96 N. C. 77; *Heinz v. Cramer*, 84 Iowa, 497.

²⁹ *Anderson v. Fisk*, 36 Cal. 625; *Kennedy v. Holman*, 19 Ala. 734; *Dickerson v. Hendryx*, 88 Ill. 66, as where the action is against one claiming title or some interest in the land, when the same are vacant and unoccupied, a plea to the whole cause of action denying that the defendant is in possession is bad.

technical issue remains the same, although presented by a different procedure.³⁰ The real claimant, the old lessor, is the plaintiff, and his complaint is that the defendant wrongfully deprives him of possession. The defendant is the real counter-claimant, and if he means to defend absolutely he pleads not guilty, and by that plea admits a possession or claim of title which should exclude or oust the plaintiff.³¹ If, at the trial, the plaintiff shows a title against which the defendant's exclusive possession or claim would be wrongful he will be entitled to judgment; otherwise not.

§ 204. **Special pleas—Statute of limitations.**—While special pleas are, as a rule, wholly unnecessary to a proper presentation of the defendant's case, and in some states are prohibited, yet with respect to defenses of a purely technical nature some diversity seems to exist. This is particularly true of the statute of limitations which has the effect, if allowed to prevail, of barring the plaintiff's suit without disproving his right and without respect to the right of the defendant. In nearly every form of action the statute of limitations, to be made available, must be specially pleaded and cannot be taken advantage of under the general issue. But while this is true as a general rule, it has repeatedly been held non-applicable to actions of ejectment.³² It is contended that a plea of the statute is simply a denial of the plaintiff's title and can have no other effect, and that, as a defense to the action, it may be resorted to under the general plea.³³ Hence, it has been said that if such a plea is filed with the general issue the court should strike it out, as tending to embarrass the trial.³⁴

But, usually, while it may not be necessary for a defendant, in order to avail himself of the benefit of the statute of limit-

³⁰ French v. Robb, 67 N. J. L. 260, 51 Atl. Rep. 509, 91 Am. St. 433; Wallis v. Wilkinson, 73 Md. 128.

³¹ See Gilchrist v. Middleton, 107 N. C. 663; Wallis v. Wilkinson, 73 Md. 128; Holman v. Elliott, 86 Ind. 233; Edwardsville R. R. Co. v. Sawyer, 92 Ill. 377.

³² Stubblefield v. Borders, 92 Ill. 279; West v. West, 89 Ind.

530; Nelson v. Brodhack, 44 Mo. 596; Fairbanks v. Long, 91 Mo. 628; Fulkerson v. Mitchell, 82 Mo. 13; Lea v. Slatterly, 7 Baxt. (Tenn.) 235; Wade v. Doyle, 17 Fla. 522; Horne v. Carter, 20 Fla. 45.

³³ Stocker v. Green, 94 Mo. 280; East v. Peden, 108 Ind. 92.

³⁴ Wade v. Doyle, 17 Fla. 522.

ations, to specially plead the same, yet this, in the absence of an express prohibition, will not preclude his so doing, while in several of the states if this form of defense is relied upon it must be specially pleaded.³⁵ The reasons which support this latter rule are not very cogent and usually it is sustained by the courts merely as an arbitrary direction of the statute.

§ 205. *Plea of title.*—As previously shown a plea of the general issue is all-sufficient at common law to admit proof of any title adverse to that of the claimant, whether vested in the defendant or some other person, and to permit the proof of any facts which go to defeat the plaintiff's right to recover. The codes of some of the states have materially changed the common-law rule by denying the defendant the right to offer in evidence any estate in himself or another, or any license or right to possession, unless the same has been specially pleaded. While the wisdom of this requirement may be open to question its authoritative force, in the states where it prevails, is beyond question, and the pleader who desires to avail himself of the benefits of title or possessory rights vested in the defendant must specifically aver them in his plea or answer.³⁶ Where this rule obtains it would further seem that where title or possessory right is pleaded, the nature and duration of the estate, or license, or right to the possession, must be set forth with practically the same certainty that would be required of any claimant suing for a recovery; failing in this the *status* of the defendant, so far as the pleadings and proof is concerned, is much the same as that of a trespasser and if the plaintiff is able to show any legal right whatever it will be deemed and taken as a superior right.³⁷

The reason of this rule, so far as it can be traced to a reason, seems to be the employment of chancery methods in legal actions. By many of the codes an attempt has been made to conform pleadings in legal actions to the standard of equity, and

³⁵ See *Custard v. Musgrove*, 47 Tex. 217; *Orton v. Noonan*, 25 Wis. 672; *Hausee v. Mead*, 27 Hun (N. Y.), 162; *Chivington v. Colorado Springs Co.*, 9 Colo. 597.

³⁶ *Allen v. Higgins*, 9 Wash. 446. And see *Carman v. Johnson*, 20 Mo. 108.

³⁷ *Allen v. Higgins*, 9 Wash. 446.

in pursuance of this policy the answer, as in equity, should be so drawn as to apprise the plaintiff of the nature of the defense relied upon.³⁸

§ 206. **Adverse possession.**—But where a special plea of title is required it does not seem that it is necessary to do more than state the general character of the title or the nature of the estate claimed. Hence, an allegation of ownership in fee of the lands in controversy will be sufficient to permit the defendant to introduce proof of any title, including that acquired by adverse possession.³⁹ Where the defendant alleges that he is the owner in fee of the disputed land, and is lawfully seized and possessed of it, this sufficiently states a title in him, and upon the trial he may prove that his title is based upon an adverse possession maintained for the requisite period of limitation.⁴⁰ In such event it is immaterial by what means he came into possession, or whether his claim is based upon color of title or whether his entry was of right or by wrong.⁴¹

§ 207. **Extrinsic facts.**—Even where a defendant is not required to set up title in himself, this fact being considered as involved in his denial of the plaintiff's right, yet if he desires to avail himself of facts not amounting to such denial, it has been held that he must specifically plead them,⁴² and this is particularly true when such facts have reference to unconsummated equities,⁴³ where defenses of this character are permitted to be relied upon as a defense in ejectment.

§ 208. **Plea of title from common source.**—Where both parties to the controversy claim title from a common source and the defendant pleads this fact specially, it would seem that he is bound thereby. That is, by his pleading he is estopped to deny the common source of title, and this estoppel precludes him from setting up an independent outstanding title with which he is not connected.⁴⁴ He is not precluded from show-

³⁸ *Water Co. v. Mooney*, 12 Cal. 534.

³⁹ *Rogers v. Miller*, 13 Wash. 82; *Bartlet v. Secor*, 56 Wis. 520.

⁴⁰ *Raymond v. Morrison*, 9 Wash. 156.

⁴¹ See *Den v. Wright*, 7 N. J. L. 175; *Patten v. Scott*, 118 Pa. St. 115.

⁴² *Nelson v. Brodhack*, 44 Mo. 596.

⁴³ *Carman v. Johnson*, 20 Mo. 108; *McCauley v. Fulton*, 44 Cal. 355; *Freeman v. Brewster*, 70 Minn. 203.

⁴⁴ *Bernhardt v. Brown*, 122 N. C. 587, 65 Am. St. 725; *Doyle v. Wade*, 23 Fla. 90; *Bank v.*

ing a superior title, provided he can also show a privity therewith, but unless it shall appear that he has acquired such paramount title from a person not bound by the estoppel, he will not be permitted to impeach the title of the common grantor.⁴⁵ This rule has often been criticised but it seems to find a general acceptance wherever invoked.

§ 209. **Former recovery.**—Many of the questions that arise with respect to abatement for former suit pending will present themselves where the plea is a former recovery, and the same reasons that lead to the solution in the one case will apply to the other. As a general rule a judgment in ejectment is conclusive upon the parties only as to the title established in the action,⁴⁶ although this will depend some on the provisions of the statute. Where this rule obtains it is not the former recovery which constitutes the estoppel, but the decision of the question in dispute, and the estoppel rests, in ejectment as well as in other cases, upon the familiar principle that when the same point has once been litigated between the same parties, and decided by a court of competent jurisdiction, it cannot be again called in question. Whether the case be one of a former judgment or a former action pending, the material point is whether the same title is sought to be litigated in both actions. This is the test, and unless the same title is involved the plea will be unavailing.⁴⁷ Hence, a judgment in an action of forcible entry and detainer cannot be pleaded as a bar to an action of ejectment, for the reason that the questions involved in the two proceedings are different,⁴⁸ and in the former suit the title to the property in controversy was not and could not have been involved.⁴⁹

§ 210. **Denial of possession.**—The theory upon which the action of ejectment is based is a deprivation of the possession

Manard, 51 Mo. 548; Schwallback v. Railway Co., 69 Wis. 292; Lewis v. Watson, 98 Ala. 479; Ames v. Beckley, 48 Vt. 395.
⁴⁶ Cooke v. Avery, 147 U. S. 375; McCready v. Lansdale, 53 Miss. 877; Christenbury v. King, 85 N. C. 229; Smith v. Lindsey, 89 Mo. 76.

⁴⁶ Ryerss v. Rippey, 25 Wend. (N. Y.) 432.

⁴⁷ Dawley v. Brown, 79 N. Y. 390.

⁴⁸ Riverside Co. v. Townshend, 120 Ill. 9.

⁴⁹ Kepley v. Luke, 106 Ill. 395.

of one legally entitled thereto, and, hence, it can be brought only by a party at the time out of possession. But while possession is so important an ingredient it has largely been lost sight of in the modern action by reason of the enlargement of the remedy as a means of trying disputed titles. Proof that the defendant is actually in possession, or even that he claims any interest in the lands, or that the plaintiff has demanded possession of same, is not usually required, nor will the plea of the general issue have the effect of raising a traverse on these essential points.⁵⁰ Indeed, by pleading the general issue, or by interposing a general denial, the defendant admits his possession of the land in controversy and this question is eliminated upon the trial.⁵¹ If it is desired to litigate the fact of possession, or secure an advantage from the reason that no demand of possession was made prior to suit, these issues must be raised by special plea. Unless this is done the possession of the defendant will be regarded as admitted, and under the issue upon the plea of not guilty, it will only be necessary for the plaintiff to prove title in himself at the time suit was commenced.⁵²

The defendant may, however, by a special plea, deny that he was in possession of the premises at the time suit was brought, and this plea, usually required to be verified by affidavit, raises a direct issue which imposes upon the plaintiff the burden of proving such possession. If the plaintiff shall not succeed in showing such possession his action is defeated,⁵³ but if he shows possession of only part he may recover for such part as his proof shows was held by the defendant at the time suit was commenced.⁵⁴ But while a defendant may file separate pleas denying his possession, or that he claims title to or interest in the land, or that a demand of possession was made before suit, yet he is limited to the particular defense set up in each, and

⁵⁰ *Wieland v. Kobick*, 110 Ill. 16; *Holman v. Elliott*, 86 Ind. 233.

⁵¹ *Holman v. Elliott*, 86 Ind. 233; *McClennan v. McCleod*, 75 N. C. 64; *Edwardsville R. R. Co. v. Sawyer*, 92 Ill. 377; *Newton v. Railway Co.*, 110 Ala. 474;

Coffin v. Freeman, 82 Me. 577.

⁵² *Edwardsville R. R. Co. v. Sawyer*, 92 Ill. 377.

⁵³ *South Park Com'rs v. Gavin*, 139 Ill. 280.

⁵⁴ *Ogilvie v. Copeland*, 145 Ill. 98.

the pleas should not profess to be to the entire cause of action.⁵⁵

A defendant who means to disavow possession should not enter any other defense.⁵⁶ If, however, he desires to disclaim as to part of the land sued for, and to contest the plaintiff's right as to the residue, he should file specific pleas denying possession of the part in which no claim is made and setting up the general issue as to the part occupied or in which he claims title.⁵⁷

§ 211. **Disclaimer of title.**—Modern statutes have so enlarged the scope of the ancient remedy as to permit the maintenance of the action not only against the person actually in possession, but also against all other persons claiming title to or interest in the lands in controversy, and all such persons may be joined in one action as defendants. If persons not in possession are so made parties, upon the theory that they are claiming title to or interest in the premises, they may put the fact in issue by a special plea,⁵⁸ and the same procedure may be followed in those cases where the action is brought to establish title to vacant and unoccupied land. It would seem, however, that when this plea is resorted to it should be the only one presented,⁵⁹ for if a general denial is made the defendant must stand or fall by the issue so tendered.⁶⁰ In such event if the plaintiff prevails he will be entitled to a judgment against the defendant, although the latter had not, in fact, claimed title to or had possession of the land recovered.⁶¹

It may be, however, that the defendant makes no claim as to part of the land sued for but does assert ownership in the balance. In such event the defendant may file a special plea disclaiming any right, title or interest in a specific part of the land together with a tender of possession, and a plea of the

⁵⁵ *Dickerson v. Hendryx*, 88 Ill. 66.

⁵⁶ *McClennan v. McCleod*, 75 N. C. 64; *Edwardsville R. R. Co. v. Sawyer*, 92 Ill. 377; *Buxbaum v. McCorley*, 99 Ala. 537. Compare, *Buésing v. Forbes*, 33 Fla. 495.

⁵⁷ *Quincy v. Railroad Co.*, 94 Ill. 537.

⁵⁸ *South Park Com'rs v. Gavin*, 139 Ill. 280.

⁵⁹ *McClennan v. McCleod*, 75 N. C. 64; *Torrey v. Forbes*, 94 Ala. 135.

⁶⁰ *Holman v. Elliott*, 86 Ind. 234; *Danner v. Crew*, 137 Ala. 617.

⁶¹ *Edwardsville R. R. Co. v. Sawyer*, 92 Ill. 377.

general issue as to the residue. In such event, should the defendant recover, he will be entitled to costs notwithstanding a judgment in favor of the plaintiff for the part disclaimed.⁶²

§ 212. **Inconsistent pleas.**—The matters just discussed bring up the subject of inconsistency in pleading, and this subject demands a brief mention. It was a rule of the common law that only one plea was available by a defendant in any action, and this was not permitted to be inconsistent with itself. The object was to avoid distracting duplicity and to secure a singleness in the issue to be tried. By statute,⁶³ this rule was abrogated in England so far as to permit a defendant, by leave of court, to plead as many several matters as he might deem necessary to his defense, and this procedure subsequently became a part of the common law of the United States. Under this system a defendant was permitted to set up any number of grounds of defense, provided they were not inconsistent with each other, and, where an attempt was made to introduce inconsistent matters the courts exercised a discretionary power to either strike out the inconsistent pleas or cause the defendant to elect upon which he would rely.

But, for many years there has been a constant relaxation of the strict rules of pleading both by the exercise of judicial discretion and legislative enactment. As a general rule a defendant may now plead as many defenses as he has or as he may deem necessary, and it has frequently been held that separate pleas are not objectionable merely because they are repugnant to or inconsistent with each other. This statement may be found without qualification in the works of able legal writers and, apparently, is supported by a formidable line of authorities.⁶⁴ Indeed, about the only restriction stated in most of the cases is, that the defenses shall be set out in separate counts, each of which must be sufficient, in itself, to present the de-

⁶² *Quincy v. Railroad Co.*, 94 Ill. 537.

⁶³ 4 Anne, ch. 16.

⁶⁴ See *Bell v. Brown*, 22 Cal. 671; *Banta v. Siller*, 121 Cal. 414, 53 Pac. Rep. 935; *Ansley v. Bank*, 113 Ala. 467, 21 So. Rep. 59; *Farnan v. Childs*, 66 Ill. 547;

Lay v. Filmore, 75 Miss. 493, 23 So. Rep. 184; *Cate v. Hutchinson*, 58 Neb. 232, 78 N. W. Rep. 500; *Goodwin v. Wertheimer*, 99 N. Y. 149, 1 N. E. Rep. 404; *Ten Broeck v. Orchard*, 79 N. C. 518; *Lawrece v. Peck*, 3 S. D. 654, 54 N. W. Rep. 808.

fense intended,⁶⁵ and must be consistent in its averments.⁶⁶ This principle has been extended to pleas in ejectment.⁶⁷

Yet, it must be admitted that a critical survey of the decided cases leaves the inquirer in doubt and confusion, and one could well wish that both courts and legislators had been a trifle less "liberal" and a trifle more "consistent." The tendency of the later decisions seems to be toward a more strict construction of the codes and statutory enactments relative to multiple pleas and inconsistent defenses. While the defendant is permitted to set up as many defenses as he has, based upon inconsistent legal theories, he yet should conform to the truth of the matter in dispute,⁶⁸ and inconsistent defenses should not be permitted to stand when the admission of the truth of one necessarily proves the falsehood of the other.⁶⁹ This would seem to be the test, so far as any test has been announced.⁷⁰

§ 213. **Continued—Special instances.**—It has frequently been held, that in an action of ejectment a defendant may deny the title of the plaintiff and also plead the statute of limitations, as such defenses are not inconsistent, nor are they such as he would be required to elect between.⁷¹ It has further been held that affirmative defenses of this character are immaterial, and need not be specifically pleaded, where the question sought to be presented by them properly arises on the trial under the general issue.⁷² In states where equitable defenses may be interposed much latitude has been shown in the matter of inconsistent pleas,⁷³ and no general rule can be formulated, but

⁶⁵ *Farnan v. Childs*, 66 Ill. 547; *Morgan v. Insurance Co.*, 37 Iowa, 359.

⁶⁶ *Hillebrant v. Booth*, 7 Tex. 499.

⁶⁷ See *Penny v. Cook*, 19 Iowa, 538; *Ledbetter v. Ledbetter*, 88 Mo. 60; *Goodman v. Nichols*, 44 Kan. 22.

⁶⁸ *South Milwaukee, etc., Co. v. Harte*, 95 Wis. 592, 70 N. W. Rep. 821.

⁶⁹ *Seattle Nat. Bank v. Jones*, 13 Wash. 281, 48 L. R. A. 177.

⁷⁰ See *Crowder v. Searcy*, 103

Mo. 97, 15 S. W. Rep. 346; *Pavey v. Pavey*, 30 Ohio St. 600; *Bell v. Brown*, 22 Cal. 671; *Gammon v. Ganfield*, 42 Minn. 368, 44 N. W. Rep. 125; *Cate v. Hutchinson*, 58 Neb. 232, 78 N. W. Rep. 500; *Snodgass v. Andross*, 19 Oreg. 236, 23 Pac. Rep. 969.

⁷¹ *Willson v. Cleaveland*, 30 Cal. 192; *Nelson v. Brodhack*, 44 Mo. 596; *Newsom v. Guy*, 109 Ala. 305, 19 So. Rep. 448.

⁷² *Rhodes v. Gunn*, 35 Ohio St. 387.

⁷³ See *Bell v. Brown*, 22 Cal.

as the plea of not guilty is usually taken as an admission of possession and puts in issue the title, it would seem that any plea which involves a contradiction or inconsistency of facts cannot be pleaded with it.⁷⁴ In such case the defendant should be required to elect between them.⁷⁵ Thus, a defendant should not be permitted to plead the general issue of not guilty and at the same time a disclaimer,⁷⁶ as the two pleas are utterly inconsistent.

§ 214. *Pleas since the last continuance.*—A plea *puis darrien* continuance was always permitted in ejectment, even while the plaintiff was merely nominal, although it seems to have seldom been employed and in England its use was discouraged. But in the United States, from a very early period, it has been held that a matter of defense arising after issue joined must be presented by this plea, and the rule applies as well to ejectment as to other actions.⁷⁷ Thus, if the defendant acquires title during the pendency of the suit such fact may be pleaded in this manner,⁷⁸ or if in any lawful method the plaintiff's right of possession shall have been extinguished and the defendant shall have become the owner of the lands in controversy, this fact may be so specially pleaded. But where the defendant acquires the plaintiff's title pending suit such fact should not be pleaded in bar to the suit generally but only in bar of its further maintenance.⁷⁹ The effect thereof is not to defeat the suit *ab initio*, but simply to stay its further prosecution; in which event the plaintiff will recover his costs up to the time of the filing of the plea.⁸⁰

Under the code system of pleading a title acquired during the pendency of the suit may be shown by a supplemental answer, which, in effect, is much the same as the common law

671; *Goodman v. Nichols*, 44 Kan. 22, 23 Pac. Rep. 957; *Reynolds v. Cook*, 83 Va. 817; *Fisher v. Stevens*, 143 Mo. 181.

⁷⁴ *Torrey v. Forbes*, 94 Ala. 135, 10 So. Rep. 320.

⁷⁵ *Fugate v. Pierce*, 49 Mo. 441.

⁷⁶ *McQueen v. Lampley*, 74 Ala. 408; *McClennan v. McCleod*, 75 N. C. 64. And see *Reynolds v. Cook*, 83 Va. 817.

⁷⁷ *Jackson v. Ramsey*, 3 Cow. (N. Y.) 75; *Bailey v. March*, 3 N. H. 274.

⁷⁸ *Mowry v. Blandin*, 64 N. H. 3.

⁷⁹ *Mowry v. Blandin*, 64 N. H. 3.

⁸⁰ *Leavitt v. School District*, 78 Me. 574.

plea since the last continuance. It has also been held, that, inasmuch as the law does not favor a multiplicity of suits, where all matters in controversy between the parties relating to title and possession can be finally ended in one action, this course must be followed, and that a neglect so to do will estop the defendant from afterward asserting the new title against the successful plaintiff.⁸¹ But, while a title acquired *pendente lite* is permitted to be shown by supplemental answer it is not usually incumbent on the defendant to so plead, the general theory of ejectment being that the action is to be tried on the title as it existed when the suit was commenced, and that the judgment rendered relates back to this time. The rule is generally applied strictly in the case of plaintiffs⁸² and the weight of authority indicates that if a defendant fails to avail himself of an after-acquired title by a supplemental plea, such title may still be afterward asserted, notwithstanding a judgment against him in the action.⁸³

§ 215. **Equitable defenses.**—In those states where the modern code practice prevails no question will probably arise respecting the right of a defendant to interpose a plea on strictly equitable grounds.⁸⁴ In other states, where modified forms of the old practice are still retained, the right to plead an equitable defense has been conceded in these cases where the matter set up authorizes the defendant to enjoin the judgment, should one be recovered against him.⁸⁵ But, to secure such right, the facts alleged in the plea must not make such a defense as is available in the common-law action, or the court will be justified in refusing to allow the plea to be filed, or in striking it out if it is filed.⁸⁶ As a rule, however, in the absence of statutory aid, an equitable defense may not be set up or proved, and even where the matter pleaded discloses a right

⁸¹ Hentig v. Redden, 46 Kan. 231; Reed v. Douglas, 74 Iowa, 244.

⁸² Green v. Jordan, 83 Ala. 220.

⁸³ See People v. Holladay, 68 Cal. 439; McLane v. Bovee, 35 Wis. 27; Hemmingway v. Drew, 47 Mich. 554; Savings Bank v. Hodgdon, 64 Cal. 98.

⁸⁴ Clyburn v. McLaughlin, 106 Mo. 521, 27 Am. St. 369; Prentiss v. Brewer, 17 Wis. 635.

⁸⁵ Johnson v. Drew, 34 Fla. 130, 43 Am. St. 172.

⁸⁶ Johnson v. Drew, 34 Fla. 130; Johnston v. Allen, 22 Fla. 224; Michael v. Joy, 91 Md. 75; Hummel v. Holden, 149 Mo. 677.

to enjoin the judgment, should one be rendered against the defendant, it has been held that the plea is inadmissible and that the proper course for the defendant to pursue is an action in equity to enjoin the further prosecution of the action at law and to show the true character of the transaction.⁸⁷ This is always a proper practice where the common-law rules prevail and is entirely consistent with such rules and the theory upon which the action of ejectment is founded. But in many states the statute now expressly permits the union of equitable and legal defenses and the effect of such statutes is to abrogate the common-law rules forbidding a joinder.

Where equitable defenses are allowed it seems that the defendant may plead a general denial and rely upon it as a complete defense, and may also, in the same answer, plead and rely on an equitable defense, the pleadings being so framed, however, as to show that both defenses are relied on.⁸⁸ But where a defendant relies upon an equitable defense it must be specially pleaded, and proof thereof is inadmissible in the absence of specific allegations,⁸⁹ while some of the cases assert that a plea of this kind should contain, in substance, the elements of a bill in equity.⁹⁰

In a few states the defendant is permitted to give in evidence, under the general denial, any facts which tend to show that the plaintiff, according to the rules of equity, should not recover,⁹¹ but this is an extremity to which but few jurisdictions have gone, and, generally, equities, if shown at all, must be presented by special plea.⁹²

§ 216. **Estoppels.**—The general rule undoubtedly is, that when an estoppel is relied upon as a defense to be rendered available on the trial it must be specially pleaded.⁹³ This is particularly true in what are known as the code states, where

⁸⁷ See *McGinnis v. Fernandes*, 126 Ill. 228.

⁸⁸ See *Ledbetter v. Ledbetter*, 88 Mo. 60; *Freeman v. Brewster*, 70 Minn. 203.

⁸⁹ *Uppfalt v. Nelson*, 18 Neb. 533.

⁹⁰ *Kentfield v. Hayes*, 57 Cal. 409; *Carman v. Johnson*, 20 Mo.

108. But see *Weld v. Johnson*, 86 Wis. 549.

⁹¹ *East v. Penden*, 108 Ind. 94.

⁹² *McCanley v. Fulton*, 44 Cal. 355; *Freeman v. Brewster*, 70 Minn. 203.

⁹³ *Hammerslough v. Cheat-ham*, 84 Mo. 21; *Fanning v. Insurance Co.*, 37 Ohio St. 346.

parties to actions are required to state the grounds which form their cause of action or constitute their defense. This was not the rule at common-law, however, nor is it recognized in some states, but the volume of authority now insists that an estoppel must be pleaded whenever an opportunity for so doing is presented.⁹⁴ At common law, in an action of ejectment, an estoppel, if admissible at all, might be shown in evidence under the general issue,⁹⁵ and the same rule has also been announced in a number of modern authorities.⁹⁶ It has further been held in states where an estoppel is required to be pleaded in order to be available as a defense, that the rule does not apply to ejectment suits in which the parties do not set up the title on which they rely.⁹⁷

⁹⁴ *De Votie v. McGerr*, 15 Colo. 467; *Davis v. Davis*, 26 Cal. 39.
⁹⁵ *Wood v. Jackson*, 8 Wend. (N. Y.) 9.

⁹⁶ *Phillips v. Blair*, 38 Iowa, 649; *Jackson v. Lodge*, 36 Cal. 38; *Mayer v. Ramsey*, 46 Tex. 371.

⁹⁷ *Tyler v. Hall*, 106 Mo. 313.

CHAPTER VIII.

THE PROOFS.

- I. BY THE PLAINTIFF.
- II. BY THE DEFENDANT.
- III. WHERE BOTH PARTIES CLAIM FROM A COMMON SOURCE.
- IV. DISPUTED BOUNDARIES.
- V. LANDLORD VS. TENANT.

I. BY THE PLAINTIFF.

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| § 217. Generally considered. | § 229. Plaintiff must rely on title asserted. |
| 218. Competency of witnesses. | 230. Proof must be consistent with allegations. |
| 219. Proof of entry and ouster. | 231. Variance between allegations and proof. |
| 220. Proof of defendant's possession. | 232. Objection to variance—When taken. |
| 221. Proof of title. | 233. Extent of proof required. |
| 222. Proof of possession. | 234. <i>Prima facie</i> title. |
| 223. Title shown must be valid. | 235. Character of title. |
| 224. Tracing title. | 236. Against grantee for condition broken. |
| 225. Continued—Origin and duration of title shown. | 237. As against mere intruders. |
| 226. Secondary evidence. | 238. On default of defendant. |
| 227. Relevancy of testimony. | |
| 228. Plaintiff must prove title as alleged. | |

§ 217. . Generally considered.—It is fundamental that a person in possession of land is presumed, in the absence of any proof to the contrary, to be the owner thereof, and he is not required to show in what manner or by what title he obtained or holds such possession. This proposition, while generally accepted, is yet subject to some qualification, for possession alone, unexplained by collateral circumstances, cannot, in strictness, evidence anything more than the mere fact of present occupation by right. This is practically as far as the pre-

sumption will extend and the quality and quantity of the interest must depend on other matters. A mere possession is just as consistent with a present interest by way of an estate at will as in one in fee. But if the possession is accompanied with a claim of ownership by the occupant, then a new and stronger presumption arises and the two circumstances unite and produce a *prima facie* title in the possessor to the extent of his proprietary claim.⁹⁸

This presumptive or *prima facie* ownership on the part of the occupant meets the demandant in ejectment at the outset, and, as the law will never presume a wrongful or tortious holding,⁹⁹ the burden of showing a superior right is thrown upon him. This right he is required to establish by affirmative evidence to enable him to recover the land.¹ He can derive no assistance from the weakness of the defendant's claim,² for the mere possession of the latter gives him a right to hold the land as against every one who cannot produce the evidence of a valid title or superior right of occupancy.³ The demandant must further establish more than a merely *prima facie* case in the event that his claim is disputed, for, while this may be sufficient under some circumstances, yet the defendant may answer by showing the real title or paramount right to be vested in a third person, and this will be enough to defeat the plaintiff's claim without in any manner connecting himself with such outstanding title.⁴ In this way he may prevent a recovery although he may have no title whatever, even though his possession was wrongful in its inception.⁵

⁹⁸ Bagley v. Kennedy, 85 Ga. 703; Harland v. Eastman, 119 Ill. 22.

⁹⁹ Patchen v. Keeley, 19 Nev. 404; Fitzgerald v. Quinn, 165 Ill. 354.

¹ Pittsburg, etc. Ry. Co. v. O'Brien, 142 Ind. 218.

² Lathrop v. Emig. Co., 41 Iowa, 547; Agnew v. Perry, 120 Ill. 655; Coffin v. Freeman, 82 Me. 578.

³ Start v. Clegg, 83 Ind. 78; Wilson v. Glenn, 68 Ala. 383;

Blackman v. Riley, 138 N. Y. 318; O'Brien v. Gaslin, 24 Neb. 559; Hurd v. Harvey County, 40 Kan. 92.

⁴ Boyer v. Thornburg, 115 Ill. 540; Hogans v. Carruth, 18 Fla. 587; Hagenbuck v. McClaskey, 81 Ind. 577; Lee v. Cook, 2 Wyo. 305. The text states the general rule, but the statutes, in some states, have created wide departures. See Duffey v. Rafferty, 15 Kan. 9, for a case in point.

⁵ Doty v. Burdick, 83 Ill. 473.

The cardinal rules of evidence apply with the same force to actions of ejectment as to other actions at law. The evidence must, in all cases, correspond with the allegations and be confined to the point in issue; the burden of proof is upon the demandant as holding the affirmative of the issue, and the best evidence of which the nature of the case is susceptible must always be adduced. As a rule the issue is general, although, under some circumstances, special issues may arise, particularly in those states where legal and equitable relief is permitted in the same action. When the general issue is pleaded the *onus* is cast upon the plaintiff of proving every material allegation of the complaint. No evidence is properly admissible in his behalf which does not tend to support the averments and the defendant is bound to do no more than to disprove such averments. Where a negative is essential to the existence of a right the party claiming same has the burden of proving such negative.⁶

In this chapter no more will be attempted than a general discussion of our present subject in its broader phases, and the details of practice, as well as the different kinds of title that may serve as a basis either of prosecution or defense, are reserved for more extended treatment in the chapters immediately ensuing.

§ 218. **Competency of witnesses.**—Under the rules which formerly prevailed the parties frequently experienced great difficulty in making proof growing out of the incompetency of witnesses by reason of their interest in the result of the suit. As a rule no one having an interest in the lands in controversy was permitted to give testimony concerning them and this doctrine was often carried to extreme lengths. The disqualifying interest was not required to be immediate and even a contingent right was frequently permitted to be raised as a bar.

The voluminous decisions upon this subject are now nothing more than obsolete learning, for, save in a very few instances, where the estates of persons deceased or of insane persons are involved, the mere fact of interest does not disqualify and if the witness is in other respects competent he may freely testify not-

⁶ *Boulden v. McIntire*, 119 Ind. 574.

withstanding he may be directly interested in the matter in issue.⁷

§ 219. **Proof of entry and ouster.**—Under the consent rule, to which allusion has been made,⁸ actual proof of entry and ouster by the defendant was dispensed with, yet, notwithstanding the terms of this rule, it seems that it was formerly necessary to show defendant's possession of the premises in dispute, and plaintiffs were frequently non-suited on subtle points arising out of this practice, quite independent of the merits of the case. To remedy this evil the courts altered the rule so as to include the confession of possession, as well as of entry and ouster, but with the abolition of the ancient practice the consent rule was itself dispensed with. But the advantages of the consent rule in the trial of the action were so many and obvious that although the rule itself was abolished the ideas which it involved were retained, and now, by statute, it is no longer necessary for the plaintiff to prove that the defendant was in possession of the land sued for, or claimed title thereto or interest therein at the time suit was commenced, unless the defendant shall deny that he was in such possession, or claims title to, or asserts some interest in the premises demanded.⁹ Under the foregoing rules, where the defendant pleads the general issue of not guilty, no formal proof of ouster is ever required. This plea, in effect, admits plaintiff's prior possession of the land in controversy and his subsequent eviction by the defendant, thus superseding the necessity of proof upon the trial.¹⁰ It puts in issue the title of the plaintiff and his right to possession, and this issue is the only question presented on the hearing.

Nor is it longer necessary, either in England or America, for the plaintiff to prove an actual entry under title, nor the actual receipt of any of the profits of the land demanded, and, in

⁷ This matter is statutory in all of the states.

⁸ See § 9, *ante*.

⁹ This is statutory, but the text states the general statutory rule. And see *Salmon v. Wilson*, 41 Cal. 595; *Holman v. Elliott*, 86 Ind. 231; *Newton v.*

Railway Co., 110 Ala. 474; *Wallis v. Wilkinson*, 73 Md. 128.

¹⁰ *Gilchrist v. Middleton*, 108 N. C. 705; *Wallis v. Wilkinson*, 73 Md. 128; *Holman v. Elliott*, 86 Ind. 233; *Wieland v. Kobick*, 110 Ill. 16; *Coffin v. Freeman*, 82 Me. 577.

every case, it is now sufficient for him to show a right to the possession of such land at the time of the commencement of the action, as heir, devisee, assignee, or otherwise.¹¹

While the books upon this subject still continue to lay down the rule that plaintiff must show an actual ouster or disseizin, yet in practice this does not seem to be necessary in a majority of the states. At most, it will be enough to show that the defendant wrongfully keeps the plaintiff out of possession.¹² The rule requiring proof of ouster, dispossession, etc., is based largely on old and obsolete cases and while it may still be retained in some localities the modern doctrine is as first stated.

There is an exception to the rule dispensing with proof of entry and ouster where the action is brought by one cotenant against another and in such case the plaintiff, in addition to all other evidence which he may be bound to give, must prove on the trial of the cause that the defendant actually ousted him,¹³ or did some other act amounting to a total denial of his right as such cotenant from which an ouster may be inferred.¹⁴ But while the rule is imperative that to maintain the action the fact of ouster must appear yet this fact may be conceded either by the circumstances of the case or the allegations of the pleadings, and, in such event, the plaintiff may be excused from making proof of same. Thus, if the plea or answer sets up a claim of right to the entire estate in the land whereby the defendant claims to be the owner of the whole thereof in severalty, or if there is an explicit denial that a cotenancy ever existed, there is no reason why stronger evidence of an ouster should be required, and the plaintiff will be relieved of the necessity of proving an ouster at the trial.¹⁵ In every case where the defendant by his plea or answer admits the withholding of the premises, averring such withholding to be lawful, this will constitute an admission of ouster.¹⁶

¹¹ This is statutory in most of the states.

¹² Lotz v. Briggs, 50 Ind. 346.

¹³ Trapnall v. Hill, 31 Ark. 198.

¹⁴ Ewald v. Corbett, 32 Cal. 499; Cross v. Robinson, 21 Conn. 385; Allen v. Long, 80 Tex. 261;

Taylor v. Hill, 10 Leigh (Va.),

457; Higbee v. Rice, 5 Mass. 351; Sigler v. Van Riper, 70 Wend. (N. Y.) 419.

¹⁵ Peterson v. Lalk, 24 Mo. 543; Noble v. McFarland, 51 Ill. 229; Allen v. Salinger, 103 N. C. 14.

¹⁶ Jordan v. Surghnor, 107 Mo. 520; Spect v. Gregg, 51 Cal. 198.

The foregoing is a resume of the general doctrines upon this subject, yet it would seem, on principle, that notwithstanding the relations sustained by cotenants the rules of evidence in contests between them should not materially differ from those which govern in the action generally. And in pursuance of this idea it has been held, in some states, that a plaintiff suing his cotenant for an undivided part of land is not required affirmatively to prove actual ouster from possession where the declaration alleges a wrongful detention of possession and the defendant pleads the general issue. In such event the plea is taken as *prima facie* evidence of adverse possession by the defendant.¹⁷

§ 220. Proof of defendant's possession.—While the statute has come in to aid defective proof in many particulars, and, in some instances, to dispense with actual proof of facts which seem essential to the maintenance of the action, it would yet seem that prudence requires the production of some evidence with respect to the possession of the lands in controversy. Ejectment is still a possessory remedy and the showing of a right of immediate possession is as essential as the proof of right of property. While the ancient fiction concerning the tenant in possession has been abolished the principle upon which it was founded has been preserved; the adverse holder is still regarded as a wrong-doer, a person in tortious possession, and unless he is so in fact at the time action is instituted it cannot be maintained against him.¹⁸ Hence, it would seem, that unless the statute expressly dispenses with proof respecting the possession of lands in dispute, or unless the defendant shall admit his possession by plea, the plaintiff may be non-suited at the trial if he fails to show that the defendant dispossessed him or was in actual possession when the action was commenced,¹⁹ or that the defendant unlawfully and wrongfully keeps him out of possession.²⁰

¹⁷ See *Kelley v. Kelley*, 182 Pa. 131.

¹⁸ *Dillon v. Center*, 68 Cal. 561.

¹⁹ See *Kirkland v. Thompson*, 51 Pa. St. 216; *Helfenstein v.*

Leonard, 50 Pa. St. 461; *Sell v. McAnaw*, 138 Mo. 267; *Dillon v. Center*, 68 Cal. 561; *Daniel v. Lefevre*, 19 Ark. 201.

²⁰ *Hurst v. Sawyer*, 2 Okla. 470.

But, as heretofore shown, a plea of the general issue, or a general denial, will usually be taken as an admission of the defendant's possession for the purposes of the action, and where this rule obtains it would seem that formal proof that defendant was in possession of the premises, or claimed an interest therein, at the time suit was commenced, although proper is not necessary.²¹

§ 221. **Proof of title.**—It devolves upon the plaintiff in the first instance, as bearing the burden of proof, to establish his right to possession. This he does, if at all, by a deraignment of his title, or by showing the special circumstances which entitle him to the immediate possession of the land.²² To maintain the action the title thus exhibited must be superior to all others, or, at least, paramount to any that may be shown in opposition, whether vested in the defendant or a third person. This is the generally received rule. For many years this rule was regarded as fundamental, and is still so regarded in a majority of the states. But, of late the rule has been much relaxed in some states, where the question of recovery is confined wholly to the claims directly asserted by the parties to the suit. Where his doctrine obtains the plaintiff may recover if he has any right to the property and if that right is superior to any right vested in the defendant, notwithstanding the paramount legal title and right to possession may be outstanding in some third person.²³

As a general proposition, however, the statutory changes have practically done little more than to abolish the fictions. The essential nature of the action has not been affected, nor has there been any change in the character of the title or right of possession necessary to support it.

A title may be established either by documentary evidence or by long and undisputed possession, or by a combination of both of these ingredients. A possessory title may be good al-

²¹ *Wieland v. Kobick*, 110 Ill. 16; *Welgold v. Pross*, 132 Ind. 87. 100 N. C. 234; *Roots v. Beck*, 109 Ind. 473.

²² *Dubois v. Holmes*, 20 Fla. 834; *Anderson v. McCormick*, 129 Ill. 308; *Conwell v. Mann*, 23 See *Duffey v. Rafferty*, 15 Kan. 9; *Lantry v. Wolff*, 49 Neb. 374; *Johnson v. Futch*, 57 Miss. 73.

though there are serious defects in the paper title,^{23a} and some proof of possession is generally necessary even when the chain of deeds is without a flaw or break.

§ 222. **Proof of possession.**—The right of the plaintiff in ejectment is usually established by the production and proof of his title deeds, yet, as a rule, this, in itself, is not enough. Some proof of possession is generally requisite to sustain the deeds,²⁴ and it has been held that a mere chain of paper title, without proof that any one of the grantors was in possession of the premises, is insufficient to show title in the plaintiff,²⁵ even as against a mere trespasser.²⁶ The statute respecting the effect of a plea of not guilty may come in to aid defective proof in this particular, or even to dispense with its production, but where the rule has been announced it has usually been stated in unqualified terms.

§ 223. **Title shown must be valid.**—Not only must the plaintiff possess an apparent legal title to the premises but it must also be such in fact,²⁷ and, frequently, this feature is a matter of substantive proof upon the trial. A deed or other muniment relied upon as a basis of claim must evidence a valid conveyance and represent a proper and legal transaction.²⁸ If it does not a recovery may be denied and the defendant is always at liberty to introduce any evidence tending to show the invalidity of the plaintiff's title because of the commission of a fraud,²⁹ or a violation of any rule of law respecting the conveyance of lands.³⁰ The fraud relied upon, however, must as a general rule, be of the character that is cognizable in a court of law; thus, the fact that a deed was obtained by fraudulent representations is not available as a defense to an action of ejectment.³¹

^{23a} *Erdman v. Corse*, 87 Md. 506, 40 Atl. Rep. 107; *Kepley v. Scully*, 185 Ill. 52.

²⁴ *Hewes v. Glos*, 170 Ill. 436.

²⁵ *Florida, etc. R. Co. v. Loring*, 51 Fed. Rep. 932; *Crawford v. Corey*, 99 Mich. 415; *Start v. Clegg*, 83 Ind. 78.

²⁶ *Gist v. Beaumont*, 104 Ala. 347.

²⁷ *Bay County v. Bradley*, 39 Mich. 163; *Hubbard v. Godfrey*, 100 Tenn. 150.

²⁸ *Goodtile v. Roe*, 20 Ga. 135.

²⁹ *Watts v. Witt*, 39 S. C. 356.

³⁰ *Sparrow v. Rhoades*, 76 Cal. 208; *Dillingham v. Brown*, 38 Ala. 311.

³¹ *Paldi v. Paldi*, 95 Mich. 410.

But this rule is not inflexible, for it will often happen that the fraud alleged is of a character that is usually denominated equitable, and yet, in proper cases, evidence thereof may be received. Nor does this practice militate against the general rule of the action which denies the exhibition of equities, for it is an admitted principle that a court of law has concurrent jurisdiction with a court of equity in cases of fraud, and in the action of ejectment may investigate questions growing out of fraudulent transactions when properly presented. These questions are usually raised in defense of the action and go to the right of the plaintiff to maintain it. The general rule is that, as between the parties, fraud vitiates all acts into which it enters, and where a conveyance upon which a party relies to establish his title is shown to have had its inception in fraud, and that he was a participant in such fraud, the title may be adjudged void and the plaintiff denied the right to recover possession.³² Thus, where deed is executed without consideration and for the express purpose of defrauding creditors, notwithstanding the grantee is clothed with an apparent legal title, yet, as such title originated in fraud the courts will refuse to aid him in recovering possession.³³ So, also, if plaintiff claims under a deed which is void because made in violation of the statutes of the United States concerning the disposal of the public lands, this fact may be shown under the general denial.³⁴

§ 224. **Tracing title.**—In the chapters which follow, the methods of proving specific titles, whether by purchase or descent, will be considered in detail, and, for this reason, no attempt will be made in this connection to exhibit their requirements. In all cases where the plaintiff alleges ownership, and this allegation is denied in the answer of the defendant, the burden of proof is upon the plaintiff to show title in himself.³⁵ This he does by a showing of investiture, by deed or otherwise.

³² *Harrison v. Hatcher*, 44 Ga. 638; *Kirkpatrick v. Clark*, 132 Ill. 342; *Watts v. Witt*, 39 S. C. 356.

³³ *Harrison v. Hatcher*, 44 Ga. 638.

³⁴ *Sparrow v. Rhoades*, 76 Cal 208.

³⁵ *Farley v. Parker*, 4 Oreg. 269; *Pittsburg, etc. Ry. Co. v. O'Brien*, 142 Ind. 218; *Conwell v. Mann*, 100 N. C. 234; *Cox v. Arnold*, 129 Mo. 337.

But a simple proof of formal investiture is not enough, as a rule, to sustain a verdict. It must further appear that the investiture was made by competent authority. In other words, by one who had the right to convey and that the conveyance was made in the manner prescribed by law. Thus, one claiming under a will must prove the seizin of the deviser and the proper execution of the will.³⁶ One claiming by deed must show the like facts of prior ownership and divestiture.³⁷ One deraigning title through a corporation must prove the legal existence of the corporation, the recitals in the deed being insufficient for this purpose as against one claiming the land through another source of title.³⁸ Where the land is claimed through a conveyance by an executive or ministerial officer, as where a sheriff's deed is relied upon, the antecedent steps leading to the deed are all material and must be shown.³⁹ Where title is claimed through the heirs at law of a person deceased it is essential for the plaintiff to show title in the deceased and then to connect his own title with that of the deceased person. This cannot be done by the mere production of a deed from the alleged heirs. In addition he must prove that the ancestor died intestate possessed of the land in question or having a legal title thereto, and that the grantors in his deed are, in fact, the heirs of such deceased person.⁴⁰ To show title from a municipality, the authority for the execution of the deed as well as the deed itself must be put in evidence. Thus, in deraigning title from a county the resolution by virtue of which the deed was given must be introduced, notwithstanding this fact may be recited in the deed. Such recital is not enough.⁴¹

Where the plaintiff sues as landlord it will generally be sufficient to show that the defendant entered as his tenant and that the term has expired,⁴² while as against a mere trespasser it will be enough to show prior possession and ouster by the de-

³⁶ *Enders v. Sternbergh*, 52 Barb. (N. Y.) 222.

³⁷ *Jones v. Bland*, 112 Pa. St. 176; *Stowell v. Spencer*, 190 Ill. 454.

³⁸ *Sonoma Water Co. v. Lynch*, 50 Cal. 503; *Ward v. Lumber Co.*, 70 Wis. 445.

³⁹ *Hobby v. Bunch*, 83 Ga. 1.

⁴⁰ *St. Louis, etc. Ry. Co. v. Warfel*, 163 Ill. 641.

⁴¹ *Ward v. Lumber Co.*, 70 Wis. 445.

⁴² *Conwell v. Mann*, 100 N. C. 234; *Tyler v. Davis*, 61 Tex. 674;

fendant.⁴³ These are the two exceptions to the general rule requiring proof of title on the part of the plaintiffs.

It is not necessary in order to maintain the action that plaintiff should base his claim on documentary evidence, and a title by adverse possession is sufficient to authorize a recovery when perfected as provided by the statute.⁴⁴ The proof, in such case must show an uninterrupted hostile possession for the statutory period, either with or without a color of title.

§ 225. Continued—Origin and duration of title shown. With respect to the origin, duration and general character of the title that must be shown on the hearing, the authorities are not agreed, nor is the policy of all of the states the same. In the newer states, formed out of the territory formerly included in the public domain, it has frequently been held that a plaintiff in ejectment must show a grant from the state or from the United States,⁴⁵ and a regular and uninterrupted chain of title to himself, unless it appears that both parties claim under the same person or from a common source of title.⁴⁶ As a general proposition, this is the proper course to be pursued in all cases which will admit of it, and considerations of safety should always suggest it to counsel conducting a case for the plaintiff. But, while this course is always desirable it does not seem that it is always necessary, and generally it will be sufficient for the plaintiff, in order to make out a *prima facie* case, to trace his title back to either an immediate or remote grantor, who, at the time of his conveyance, was in possession of the land claiming it in fee.⁴⁷ Such a case can be overcome only by proving a paramount title either in the defendant or in a stranger, and in the absence of rebutting evidence the plaintiff will be entitled to a verdict as a matter of law.⁴⁸

Morgan v. Morgan, 65 Ga. 493;
Voss v. King, 38 W. Va. 607.

⁴³ Whitaker v. Pendola, 78 Cal. 296; Hacker v. Horlemus, 74 Wis. 21; Ware v. Dewberry, 84 Ala. 568.

⁴⁴ Barnes v. Light, 116 N. Y. 34; Ratcliff v. Iron Works, 87 Ky. 559.

⁴⁵ Harvey v. Anderson, 129 Mo. 206.

⁴⁶ Omaha, etc. Co. v. Kragscow, 47 Neb. 592, 66 N. W. 658.

⁴⁷ Anderson v. McCormick, 129 Ill. 308; Jones v. Bland, 112 Pa. St. 176; Hoban v. Cable, 102 Mich. 206.

⁴⁸ Harland v. Eastman, 119

Where the parties claim through a common source the proof is greatly simplified and about all that devolves on the plaintiff is to show a better title from the common source.⁴⁹ So, also, where the rights of the litigants have been determined in a former action, though of a different character, the judgment entered therein will be sufficient in most cases to establish the plaintiff's title. Thus, where in an action for partition the rights of all of the parties were found and awarded, upon an action of ejectment thereafter brought by one of the defendants against the others, the judgment roll in the partition suit would be competent and conclusive evidence to prove the title of the plaintiff.⁵⁰

§ 226. **Secondary evidence.**—As previously remarked, the general rule, that the best evidence of which the case in its nature is susceptible must always be produced, is fully applicable to actions of ejectment. Yet it must often happen that primary evidence of many essential facts cannot be produced and that recourse must be had to the next best forms. Where original deeds have been lost or destroyed the records, if the deeds were recorded, will furnish evidence of equal dignity, but if the deeds were not recorded, or, if recorded, the record has been destroyed, resort must necessarily be had to copies or other forms of secondary evidence. In like manner, in proving title by descent, evidence of reputation and other forms of hearsay, will frequently be the only method of proving some of the incidents of pedigree.

Secondary evidence of a deed is admissible where it is shown that the original deed could not be found after proper search was made therefor,⁵¹ and where a deed and the record thereof have both been destroyed, the court may receive all such evidence as would tend to establish its execution and contents^{51a}. Thus, a lost deed may be established by abstracts of title show-

Ill. 22; *Day v. Alverson*, 9 Wend. (N. Y.) 223.

⁴⁹ *Myrick v. Wells*, 52 Miss. 149.

⁵⁰ *Hancock v. Lopez*, 53 Cal. 362. And see *Wright v. McCormick*, 77 N. C. 158.

⁵¹ *Gillespie v. Gillespie*, 159 Ill. 84; *Windom v. Brown*, 65 Minn. 394.

^{51a} *Tucker v. Shaw*, 158 Ill. 326; *Hobbs v. Beard*, 43 S. C. 370.

ing the ownership of the land in controversy;⁵² or by the testimony of witnesses who had seen and read it and knew the contents thereof.⁵³ When the deed relied upon is in the possession or under the control of the adverse party if notice to produce is given, and such notice is ignored by the party served, secondary evidence of its contents may be received.⁵⁴

In order to authorize the introduction of secondary evidence of the contents of an alleged lost instrument it is first necessary to show that such an instrument once existed;⁵⁵ that diligent search therefor has been made, and that it cannot be found;⁵⁶ or, that it has been accidentally destroyed.⁵⁷ In the case of lost instruments the sufficiency of the search depends much on the nature of the instrument and the circumstances of the case.⁵⁸ No precise rule can be prescribed as to what shall constitute a reasonable effort, but the party alleging the loss of a document must show that he has in good faith exhausted, in a reasonable degree, all sources of information and means of discovery which the nature of the case would suggest and which are accessible to him.⁵⁹ The sufficiency of the evidence of the loss or destruction of the original deed is addressed to the discretion of the trial judge.⁶⁰

⁵² *Burdick v. Peterson*, 72 Fed. Rep. 864.

⁵³ *Burdick v. Peterson*, 72 Fed. Rep. 864; *Stebbins v. Duncan*, 108 U. S. 32.

⁵⁴ *Hanson v. Eustace*, 43 U. S. 653; *Cohen v. Insurance Co.*, 69 N. Y. 300.

⁵⁵ *Windom v. Brown*, 65 Minn. 394; *Helton v. Asher*, 103 Ky. 730, 46 S. W. Rep. 22; *Weiler v. Monroe County*, 74 Miss. 682.

⁵⁶ *Woods v. Monteville, etc. Co.*, 84 Ala. 560; *Kelsey v. Hammer*, 18 Conn. 311; *Rullman v. Barr*, 54 Kan. 643; *Hall v. Gallimore*, 138 Mo. 638, 40 S. W. Rep. 891.

⁵⁷ *Slocum v. Bracey*, 65 Minn. 100; *Potter v. Adams*, 125 Mo. 118; *Krewsom v. Purdon*, 15

Oreg. 589. Parol evidence of a deed is admissible on proof that on the death of the grantee his brother searched among his papers and elsewhere and did not find the deed, and that none of the grantee's heirs had possession of it or knew where it was. *Bounds v. Little*, 79 Tex. 128.

⁵⁸ *Wiseman v. Railroad Co.*, 20 Oreg. 425; *Johnson v. Arnwine*, 42 N. J. L. 451.

⁵⁹ *Harmon v. Decker*, 41 Oreg. 587, 68 Pac. Rep. 11; *Woods v. Monteville, etc. Co.*, 84 Ala. 560. But see *Postel v. Palmer*, 71 Iowa, 157.

⁶⁰ *Hume v. Hopkins*, 140 Mo. 65, 41 S. W. Rep. 784.

Where an alleged copy is offered it must be shown, by proper evidence, that such paper is a substantial copy of the original.⁶¹

Where a claim is asserted under a deed alleged to have been lost, and of which no documentary secondary evidence can be furnished, much difficulty will necessarily be experienced in making proof. It seems, however, that even under these circumstances the claimant should be allowed to show collateral facts tending to sustain his claim, as that he paid the purchase money, entered into possession, etc., and that the question as to whether the deed alleged to be lost was in fact executed, should be submitted to the jury.⁶² In all cases, however, the rules respecting the establishment of title to real property under a lost unrecorded deed are very strict.⁶³

It may happen that a deed is produced but by accident has become obliterated or partially destroyed. In such event recourse may be had to the record, and, if the record is also destroyed, then parol evidence is admissible to supply the missing or obliterated parts.⁶⁴

§ 227. **Relevancy of testimony—Order of proof.**—The question of relevancy of testimony arises in almost every trial and the improper rejection or reception of evidence is usually one of the main arguments for the reversal of a judgment. Of course, all evidence should be relevant to the question at issue and tend to prove it, and it is within the discretion of the court to reject testimony apparently irrelevant at the time it is offered. But it should not be excluded if it has a tendency, however remote, to establish the probability of the fact in controversy,⁶⁵ and, generally, where the admissibility of evidence depends upon a number of facts, to some extent independent of each other, and where each fact must be proved to complete the chain of evidence, the court, in the exercise of its discretion, should refuse to interfere in the order of testimony. A beginning must be made somewhere, and while the better plan would

⁶¹ *Felbelman v. Assurance Co.*, 108 Ala. 180.

⁶² *Terry v. Rodahan*, 79 Ga. 278.

⁶³ *Day v. Philbrook*, 89 Me. 462.

⁶⁴ *Landry v. Landry*, 45 La. Ann. 1113.

⁶⁵ *Trull v. True*, 33 Me. 367; *Hough v. Cook*, 69 Ill. 581.

undoubtedly be to commence with the origin of title, either at its source or some admitted point in its history, and then follow its course in logical sequence to the claimant, yet, where this is not done and the evidence offered can be made material only by additional evidence, if counsel offers to supply the necessary connectives the testimony will generally be received subject to objection and to be stricken out if the missing links are not subsequently supplied.

These rules have frequently been applied in trials of the action of ejectment and it has been held that a party has the right to commence anywhere in his chain of title.⁶⁶ The court cannot know, until the party has rested his case, whether the proof is perfect or not, and the reasonable presumption is that the evidence offered will be followed by such other proof as is necessary for its proper connection. If, after the testimony is closed, a link is wanting, then, as a matter of course, the case must fail and the evidence offered should on motion be excluded from the jury.⁶⁷

§ 228. **Plaintiff must prove title as alleged.**—The same principle, which, under the old practice, when the names of fictitious parties were used, prevented a recovery by the plaintiff unless he showed himself entitled to the possession at the time of the demise laid in the declaration, has remained practically unchanged through all the mutations to which the action has been subjected. The plaintiff must recover, if at all, upon his legal title as it stood at the commencement of the suit,⁶⁸ or, as stated by many of the authorities, at the time alleged in the declaration that he had title,⁶⁹ and it has been held in some cases that where the title displayed in evidence is shown to have accrued after such time, even though before the commencement of the suit, he cannot recover.⁷⁰

⁶⁶ *Asher v. Mitchell*, 92 Ill. 480.

⁶⁷ *Rogers v. Brent*, 10 Ill. 573.

⁶⁸ *Craig v. Bennett*, 146 Ind. 574; *Dunlap v. Henry*, 76 Mo. 106; *Hollingsworth v. Flint*, 101 U. S. 591; *Goodman v. Winter*, 64 Ala. 410; *Torrance v. Betsy*,

30 Miss. 129; *Kile v. Tubbs*, 32 Cal. 332; *Mitchell v. Lines*, 36 Kan. 378; *Kelley v. McKeon*, 67 Wis. 561.

⁶⁹ *Wood v. Norton*, 11 Ill. 547; *Foster v. Stapler*, 64 Ga. 760; *McCoal v. Smith*, 66 U. S. 450.

⁷⁰ *Pitkin v. Yaw*, 13 Ill. 251.

The general rule, however, is as first stated and under this rule if the plaintiff is without legal title at the time of commencement of his suit he cannot recover,⁷¹ notwithstanding he may have had an equity which ripened into a legal title after the suit was brought.⁷² He must recover, if at all, upon his title as it existed at the institution of his suit,⁷³ and even though he has the legal title, yet if at the time suit was commenced his right of possession was intercepted for any valid cause he cannot recover⁷⁴ even though such intercepting cause is subsequently removed.⁷⁵

So, too, if he pleads that his title was derived from one source he cannot show upon the trial that it was derived from another source,⁷⁶ even though the allegation as to the source of title may have been unnecessary. But a mere misrecital of the date of a deed in the pleadings will not prevent its admission in evidence on the ground of variance,⁷⁷ nor will this objection lie where the description of the land as declared for departs in some measure on the proof, provided the land can be sufficiently identified after rejecting the conflicting calls.⁷⁸

§ 229. Plaintiff must rely on title asserted.—Not only must the plaintiff prove title as alleged, but it is a fundamental rule, adopted and established wherever the action of ejectment prevails, that he must recover, if at all, only on the strength of the title thus shown, and not upon the weakness of that of the defendant.⁷⁹ Probably no rule connected with the action is

⁷¹ Perciful v. Platt, 36 Ark. 456; Green v. Jordan, 83 Ala. 220; Mills v. Graves, 44 Ill. 50; Nalle v. Thompson, 173 Mo. 595.
⁷² Paul v. Fries, 18 Fla. 573; Goodman v. Winter, 64 Ala. 410.
⁷³ Mexia v. Lewis, 3 Tex. App. 113; Cofer v. Schening, 98 Ala. 338; Nowlen v. Hall, 128 Mich. 274.

⁷⁴ Grandin v. Hurt, 80 Ala. 116; Converse v. Dunn, 166 Ill. 25; Finley v. Babb, 144 Mo. 403; Voight v. Ruby, 90 Va. 799; Richardson v. Railway Co., 89 Md. 126; Wells v. Steckelberg, 52 Neb. 597.

⁷⁵ Cofer v. Schening, 98 Ala. 338.

⁷⁶ Utassy v. Gledinghagen, 132 Mo. 53, 33 S. W. Rep. 444; Brown v. Moore, 26 S. C. 160. And see Lane v. Queen City, etc. Co., 66 Ark. 646. But compare Keathley v. Branch, 88 N. C. 379.

⁷⁷ Peck v. Ashurst, 108 Ala. 429, 19 So. Rep. 781.

⁷⁸ Chicago, etc. R. R. Co. v. Morgan, 69 Ill. 492.

⁷⁹ Mitchell v. Lines, 36 Kan. 378; England v. Hatch, 80 Ala. 247; Foster v. Evans, 51 Mo. 39; Fulton v. Hanlon, 20 Cal. 450;

more firmly established or sustained by more abundant authority.

There are, however, some apparent exceptions to the rule as above stated, and it has been held that such relations may exist between the parties as will dispense with the production of proof of title on the part of the plaintiff. Thus, it is said, a party in possession under the plaintiff cannot controvert the title under which he entered; if he was admitted into possession under a contract of purchase with the plaintiff, the latter, in an action to regain the possession, will not be required to make proof of his title,⁸⁰ nor is a landlord, in an action against his tenant, compelled to show title.⁸¹ So, too, if the plaintiff had actual possession of the land at the time of defendant's entry, this will be enough to enable him to recover from a mere trespasser.⁸²

§ 230. **Proof must be consistent with allegations.**—Not only should the plaintiff disclose the nature and extent of his interest in his declaration but the proof offered in support of same should correspond to and be consistent therewith. So strictly was this rule formerly applied that any departure was fatal to the action, as, if the plaintiff claimed an entirety and his proof showed only an undivided interest, he could not recover.⁸³ But this rule is now practically without effect in a case similar to that last mentioned, and a plaintiff may still recover notwithstanding that the interest which he establishes on the trial may differ in quantity or quality from that claimed in the declaration. That is, if he declares for the whole and the

Sullivan v. Dimmitt, 34 Tex. 114; Shumway v. Phillips, 22 Pa. St. 135; Wallace v. Swinton, 64 N. Y. 188; Fussell v. Gregg, 113 U. S. 550; Masterson v. Cheek, 23 Ill. 72; Marshall v. Barr, 35 Ill. 106; Sanford v. Mangin, 30 Ga. 355; Goulding v. Clark, 34 N. H. 148; Stehman v. Crull, 26 Ind. 436; Opel v. Kelsey, 47 Ark. 413; Kelley v. McKeon, 67 Wis. 561.

⁸⁰ McKibben v. Newell, 41 Ill. 461.

⁸¹ Tilghman v. Little, 13 Ill. 239.

⁸² House v. Reavis, 89 Tex. 626, 35 S. W. Rep. 1063; Burbage v. Fitzgerald, 98 Ga. 582; Sherin v. Brackett, 36 Minn. 152; Ashmead v. Wilson, 22 Fla. 255; Lum v. Reed, 53 Miss. 73; Clarke v. Clarke, 51 Ala. 498.

⁸³ See Benson v. Musseter, 7 H. & J. (Md.) 212; Rupert v. Mark, 15 Ill. 540; Martin v. Neal, 125 Ind. 547.

proof shows only an undivided interest,⁸⁴ or if he claims a specific undivided interest and the evidence discloses a different and much smaller interest,⁸⁵ he may still recover such interest, notwithstanding the apparent departure.

But where the allegation is of an estate in fee it seems it will not be supported by proof of an estate for years,⁸⁶ and, generally, where the declaration is laid on a legal title plaintiff cannot prove and recover on an equitable one.⁸⁷ Neither can the plaintiff set up several inconsistent titles and then recover on the ground that one or the other of them is good. Some sound and sufficient title must be alleged and established on the trial.⁸⁸ Nor can he be permitted to allege title in one tract and prove title to another; as where the declaration alleges title in the west half of a quarter section and the proof shows title in east half. This has been held to be a fatal variance,⁸⁹ yet under the statute of amendments as it exists in some states it may be that such a defect might be cured if taken in time. But where the declaration describes the land sued for as the east half of a certain tract and the deed offered in evidence is for the south half of the same tract, notwithstanding there is a palpable variance in description, yet, since one is necessarily overlapped in part by the other the deed may still be admitted.⁹⁰

§ 231. **Variance between allegations and proof.**—A variance is a substantial departure from the issue, in the evidence adduced, and must be of some matter which, in point of law, is essential to the claim.⁹¹ Formerly the plaintiff was held strictly to his allegations and could recover only on the case made by his declaration. He could not recover a different estate from that which he claimed, nor a different share or interest from that alleged,⁹² and the early cases show that these

⁸⁴ *Almond v. Bonnell*, 76 Ill. 536.

⁸⁵ *Gray v. Givens*, 26 Mo. 303.

⁸⁶ *Hunt v. Campbell*, 83 Ind. 48; *Almond v. Bonnell*, 76 Ill. 536; *Rawson v. Taylor*, 57 Me. 343.

⁸⁷ *Sutton v. Alken*, 57 Ga. 416; *Kirkland v. Cox*, 94 Ill. 400; *Stout v. McPheeters*, 84 Ind. 585.

⁸⁸ *Brownsville v. Basse*, 36

Tex. 461. But see *Leary v. New*, 90 Ind. 502; *St. Louis v. Risley*, 28 Mo. 415.

⁸⁹ *McCormick v. Huse*, 78 Ill. 363.

⁹⁰ *Green v. Jordan*, 83 Ala. 220.

⁹¹ *Kelser v. Topping*, 72 Ill. 226.

⁹² *Winstanley v. Meacham*, 58 Ill. 97.

rules were applied at times with much harshness. To obviate in some measure the difficulties which the rule occasioned, and to provide against possible variances between the allegations and proof, it was customary for the pleader to insert a number of counts in his declaration, and this course may still be resorted to in cases of doubt. The statute has greatly relaxed the rigor of the old rules above mentioned and removed many of the causes that formerly resulted in a variance, yet the general rule, that the proofs must correspond with the allegations, still holds good and is often administered with considerable rigidity.

If the variance can be reconciled, however, this should always be done, and courts are ever inclined to treat matters of this kind with leniency. Opportunities for the application of this rule will frequently be presented in the matter of description of the land sued for. Thus, if the description in the declaration calls for a lot bounded on the west by A street and the proof offered is for a lot bounded on the west by B street, there will be a palpable variance. But the variance, in such case will be immaterial if by rejecting the western boundary the land may still be sufficiently identified by the other boundaries and by the calls for dimensions.⁹³ On the other hand, if the variance cannot be reconciled it will be fatal to action. As if the declaration describes a tract of land lying west of a certain meridian and the deed offered in evidence purports to convey a tract lying east of the same meridian, such evidence must be excluded as it is apparent that the land described in the deed cannot be the land in controversy.⁹⁴

§ 232. **Objection to variance—When taken.**—An objection as to a variance between the declaration and evidence in an action of ejectment should be interposed when the evidence is offered, or, at least, a motion to exclude it from the jury should be made after the evidence has been closed. The plaintiff, in such case would be afforded an opportunity of amending his declaration so as to correspond with the facts proved. If, in case of variance, the defendant remains silent, raises no ob-

⁹³ *Chicago, etc. R. R. Co. v. Morgan*, 69 Ill. 492; *Shackleford v. Bailey*, 35 Ill. 387.
⁹⁴ *Lochte v. Austin*, 69 Miss. 271.

jection to the relevancy of the evidence, and finally goes to the jury on the proofs as submitted, speculating on the chances of a verdict in his favor, he cannot, if unsuccessful, make the objection for the first time in a court of review.⁹⁵

§ 233. **Extent of proof required.**—In an action to recover the possession of land the burden of establishing his title and right to possession by affirmative proof is cast upon the claimant.⁹⁶ This duty he fully discharges, in the absence of proof that both parties claim under the same person or from a common source of title, by showing a grant from the state or United States and a regular and uninterrupted chain of title to himself,⁹⁷ or by proving a title by adverse possession under the statute of limitations.⁹⁸

But, while it is fundamental that the plaintiff in ejectment must recover, if at all, on the strength of his own title, and not on the weakness of that of his adversary, yet it is not always necessary for him to commence by deraigning his title from its source and then to trace each successive transfer down to himself. As has been shown, if both parties claim under the same person, this is an admission that such person possessed title. So, also, if the defendant acquired his possession as a tenant of the plaintiff, this fact will warrant a presumption of title in the latter.⁹⁹

It would seem further, that, if plaintiff claims by descent, it is sufficient for him, in the first instance, to prove his heirship, and that the ancestor under whom he claims was the person last seized of the lands in controversy.¹ If the claims by purchase he must connect himself by deed or will with the prior owner and show by proper proof the validity of such deed or will and the seizin of his grantor or deviser.² The seizin, in all such cases, may be established by proof of the possession of such ancestor, grantor or deviser, either in person or by ten-

⁹⁵ *Schoonmaker v. Doolittle*, 383; *Jacks v. Chaffin*, 34 Ark. 118 Ill. 605. 534.

⁹⁶ *Pittsburg, etc. Ry. Co. v. O'Brien*, 142 Ind. 218; *Grandin v. Hurt*, 80 Ala. 116. ⁹⁹ *Jones v. Bland*, 112 Pa. St. 176.

⁹⁷ *Omaha R. E. & T. Co. v. Kragscow*, 47 Neb. 952. ¹ *Weaver v. Rush*, 62 Ark. 51; *Jones v. Bland*, 112 Pa. St. 176.

² *Florida S. R. Co. v. Burt*, 36 Fla. 497. ⁹⁸ *Wilson v. Glenn*, 68 Ala.

ant.³ As against a defendant who is a stranger to the party from whom the plaintiff derives title it would seem the latter makes a *prima facie* case by showing the possession of his grantor at the time the deed was delivered or that his ancestor or deviser died in possession of the lands in question.⁴ This will be sufficient to throw upon the defendant the burden of proving his own title or that some third person owns the land and is entitled to its possession.⁵

As against a naked trespasser, proof of actual possession or receipt of rent prior to the eviction, is *prima facie* evidence of title on which a recovery may be had.⁶ No presumption should be resorted to for the purpose of helping out the possession of a trespasser.⁷

Where title is claimed through execution or judicial sale it will be sufficient, in all cases where the suit is brought against the judgment debtor, to show the judgment and proceedings under it resulting in sale.⁸ So, too, where lands have been sold by an administrator under a decree of the probate court, and the purchaser brings ejectment against the heirs of the decedent, the deed of the administrator, together with the order of sale and decree of confirmation, will constitute a *prima facie* case,⁹ and raise a presumption that all of the necessary antecedent steps were taken.¹⁰

§ 234. *Prima facie* title.—The matters discussed in the last paragraph have reference to what is generally known as *prima facie* title, that is, a title which on its face appears to be sufficient without demonstration. There is some confusion in the books with respect to the character and extent of title that

³ Jones v. Bland, 112 Pa. St. 176.

⁴ Mobley v. Bruner, 59 Pa. St. 481; Florida S. R. Co. v. Burt, 36 Fla. 497; Douglass v. Ruffin, 38 Kan. 530; Jones v. Bland, 112 Pa. St. 176.

⁵ Weaver v. Rush, 62 Ark. 51.

⁶ Burt v. Panjaud, 99 U. S. 180; Casey v. Kimmel, 181 Ill. 157; House v. Reavis, 89 Tex. 626; Hentig v. Pipher, 58 Kan. 788; John Henry Shoe Co. v.

Williamson, 64 Ark. 100; Cook v. Bertram, 86 Mich. 359.

⁷ Western U. B. Co. v. Thurman, 70 Fed. Rep. 960.

⁸ Bank v. Raynor, 61 Cal. 145; McKee v. Lineberger, 87 N. C. 181; Shipley v. Shook, 71 Ind. 511.

⁹ Moore v. Cottingham, 113 Ala. 148.

¹⁰ Price v. Springfield, etc. Ass'n, 101 Mo. 107.

plaintiff must deraign in the first instance in order to justify a verdict of recovery. Where the general issue only is pleaded it would seem that proof of prior possession, under claim of ownership in fee, by the grantor, or others under whom the plaintiff claims, or by those to whose title he is privy, is *prima facie* evidence of ownership and seizin sufficient to authorize a recovery,¹¹ unless the defendant shows a better title.¹² The conflict is with respect to the title or possession of plaintiff's grantor.

§ 235. **Character of title.**—At the present time there exists much uncertainty with respect to the character of the title that must form the basis for the plaintiff's recovery. At common law, to authorize a recovery in ejectment, where the defendant is in possession, a valid legal title must be shown.¹³ This rule is of general and uniform observance, and, except as it may have been altered or modified by statute, seems to be rigid and unyielding in all cases where the action depends upon the title and not upon some relation or agreement between the parties, affecting the right of possession.¹⁴

Where the rule, as stated, prevails, the plaintiff must establish his legal title, at the time of the demise laid in the declaration, either upon a connected documentary chain of evidence, or upon proofs of possession under a claim of right of sufficient duration to warrant the conclusion of the existence of such written title.¹⁵ An equitable title will not be sufficient unless it also confers a present legal right to the possession¹⁶

In a number of states the rule of the common law has been changed by statute or judicial construction, and actions are

¹¹ *Stowell v. Spencer*, 190 Ill. 453.

¹² *Harrell v. Bank*, 183 Ill. 538; *Stowell v. Spencer*, 190 Ill. 453; *Mobley v. Bruner*, 59 Pa. St. 481; *Douglass v. Ruffin*, 38 Kan. 530.

¹³ See *Eaton v. Smith*, 19 Wis. 537; *Leonard v. Diamond*, 31 Md. 541; *Ruffners v. Lewis*, 7 Leigh (Tenn.), 720; *McKay v. Williams*, 67 Mich. 547; *Langdon v. Sherwood*, 124 U. S. 74, 31 L. Ed. 344; *Morehouse v.*

Phelps, 62 U. S. 294, 16 L. Ed. 140.

¹⁴ *Jackson v. Demont*, 9 Johns. (N. Y.) 60; *Dale v. Hunneman*, 12 Neb. 221; *Laurissini v. Doe*, 25 Miss. 177; *Walton v. Follansbee*, 131 Ill. 147; *Grandin v. Hurt*, 80 Ala. 116; *Langdon v. Sherwood*, 124 U. S. 74.

¹⁵ *Fenn v. Holme*, 21 How. (U. S.) 481; *Craig v. Bennett*, 146 Ind. 574.

¹⁶ *Perciful v. Platt*, 36 Ark. 456.

permitted on incipient equities. This change seems to have grown out of the early exigencies of purchasers of government lands. It frequently happened that after land had been duly entered by the purchaser the patent therefor did not issue for a number of years. The receiver's receipt, coupled with possession, was all the evidence of title the land-owner could produce and this, after a time, came to be regarded as equivalent to full legal investiture. Accordingly we find decisions in many of the Western and Southern states at a comparatively early day which recognize and uphold titles based upon equities of this kind, and after a time it became a settled doctrine in such states, that an equity, if perfect, however the same may have been created, may be shown in a legal action for the recovery of land.¹⁷ This doctrine has been incorporated in many of the codes and now prevails in a number of states.

In the Federal courts the rule has always been that equitable interests cannot be enforced in an action of ejectment,¹⁸ but to this rule there are exceptions in respect of particular titles. Thus, under Acts of Congress confirming claims to lands as valid, after a survey has been made, approved, and recorded in the surveyor-general's office, an action may be maintained on such titles in the courts of the United States.¹⁹ But this is about the full extent of the exception, and notwithstanding a state law may permit an ejectment to be brought on an entry with a register and receiver, such law has no force or effect in the Federal courts.²⁰

A purely possessory title, if properly established, will be all sufficient for the purposes of an ejectment,²¹ and possession, if sufficiently proved, will serve as a substitute for a deed constituting a link in the plaintiff's chain of title.²² But a plaintiff

¹⁷ See *Tobey v. Secor*, 60 Wis. 310; *Hill v. Punkett*, 41 Ark. 465; *Hicks v. Lovell*, 64 Cal. 17; *Dodge v. Spiers*, 85 Ga. 585; *Hurd v. County Com'rs*, 40 Kan. 92; *Merrill v. Dearing*, 47 Minn. 137; *Brousard v. Brousard*, 43 La. Ann. 921; *Pierce v. Frace*, 2 Wash. 81; *Strother v. Lucas*, 31 U. S. 763.

¹⁸ *Carpentier v. Montgomery*,

13 Wall. (U. S.) 480; *Langdon v. Sherwood*, 124 U. S. 74.

¹⁹ *Stoddard v. Chambers*, 2 How. (U. S.) 284; *McCall v. Carpenter*, 18 How. (U. S.) 297.

²⁰ *Hooper v. Scheimer*, 23 How. (U. S.) 235.

²¹ *Hackett v. Marment Co.*, 52 Fed. Rep. 268.

²² *Martin v. Bowie*, 37 S. C. 102.

iff who relies solely upon a title which had its inception in an adverse holding must show that it continued uninterrupted for the statutory period necessary to perfect the title in fee and cannot recover, in the absence of such showing, merely because the deeds under which defendant claims may be void.²³

§ 236. **Against grantee for condition broken.**—The general subject of conditions in avoidance of a grant, and the right of re-entry for condition broken, has been discussed in other parts of this work. At this point the only matter to engage our attention is the proof necessary to be adduced by a plaintiff who seeks to recover possession by reason of a breach of condition. It would seem that where an action is brought on these grounds no formal proof of title is required, for, as in the case of a tenant, if the condition is enforceable the defendant is estopped to deny the title under which he entered. Neither is it necessary, in order to enable the plaintiff to recover, that he should show where or how he procured his title, nor even what that title was.²⁴ It is enough to show the deed under which defendant entered; to establish the validity of the condition upon which the grant was made; and to prove a violation of the condition. This done, the plaintiff is entitled to recover unless the defendant can show that the condition has been released, waived or discharged.²⁵

§ 237. **As against mere intruders.**—While the fundamental rule that a plaintiff in ejectment must recover, if at all, on the strength of his own title and not upon the weakness of that of his adversary, is everywhere admitted and enforced, yet a recovery may be had in some cases on bare possession only. This may occur where there has been an actual ouster of a tenant, or where recovery is sought against a naked trespasser.²⁶ In such event a judgment may be rendered on simple proof of prior possession.²⁷ Nor does such a course militate against

²³ *Murray v. Hoyle*, 97 Ala. 703; *Dothard v. Denson*, 72 Ala. 588.

²⁴ *Wakefield v. Van Tassell*, 202 Ill. 41.

²⁵ *Hutchinson v. Ulrich*, 145 Ill. 342; *Gray v. Blanchard*, 25 Mass. 284; *Pepin County v. Prindle*, 61 Wis. 301.

²⁶ *Bagley v. Kennedy*, 85 Ga. 541; *Ashmead v. Wilson*, 22 Fla. 259; *Sherwin v. Brackett*, 36 Minn. 152; *Casey v. Kimmel*, 181 Ill. 157.

²⁷ *Dothard v. Denson*, 72 Ala. 541; *Probst v. Trustees*, 3 N. M. 237; *Am. Mtg. Co. v. Hopper*, 48 Fed. Rep. 47.

the fundamental rule first stated, for possession, in itself, is *prima facie* evidence of title,²⁸ sufficient to sustain a recovery from a mere intruder.²⁹

In making proof of prior possession it does not seem that any more is necessary than to show that the possession was quiet and peaceable and held under a claim of right. No evidence of investiture of title is required and any competent testimony which tends to show a rightful occupation is sufficient. Thus, plaintiff may show a contract between the owner of the land and himself, or he may introduce letters from such person showing a recognition of his possessory rights.³⁰

§ 238. On default of defendant.—The rule is general that, if a defendant served with summons fails to enter his appearance, or to plead to the declaration, the latter may be taken against him as confessed. A default, in an action of ejectment admits all the material allegations of the plaintiff's declaration, including that of the ownership of the land, and no proof of title in such case is necessary.³¹

II. BY THE DEFENDANT.

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²⁸ *Plume v. Seward*, 4 Cal. 94; *Coombs v. Hertig*, 162 Ill. 173.

²⁹ *Rau v. Railway Co.*, 13 Minn. 442; *Nagle v. Macy*, 9 Cal. 427; *McCall v. Doe*, 17 Ala. 533; *Bagley v. Stephens*, 18 Ga. 304; *Christy v. Scott*, 55 U. S. 282, 14 L. Ed. 422; *Wilson v. Fine*, 38 Fed. Rep. 789; *Barger v. Hobbs*, 67 Ill. 592; *Mobley v.*

Bruner, 59 Pa. St. 481; *Hall v. Gallamore*, 138 Mo. 638; *Sherin v. Brackett*, 36 Minn. 152. But see *contra*, *Hubbard v. Godfrey*, 100 Tenn. 150.

³⁰ *Nolan v. Pelham*, 77 Ga. 262.

³¹ *Tucker v. Hamilton*, 108 Ill. 464.

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263. Easement — Rights of way. |
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§ 239. Generally considered.—Inasmuch as the claimant in ejectment must recover, if at all, upon the strength of his own title, without regard to the weakness or defects of that of the defendant, and as the burden of showing a clear and substantial title as well as a present right of possession of the premises in dispute, devolves upon him, it follows that the defendant's evidence will usually be mainly of a negative character, confined largely to falsifying the plaintiff's proofs or rebutting the presumptions which may arise out of them. He is not required to produce affirmative evidence of his own rights, nor to show title subsisting in himself or a third person, but is entitled to a verdict by simply showing that the plaintiff is without title or a present right to hold and enjoy the land. In other words, the defendant's evidence depends on the nature of the proofs advanced by the plaintiff and need not be extended beyond the rebuttal of them. In a general way the defense has been incidentally discussed in treating of the nature and order of the plaintiff's proofs and but little remains to be said in addition thereto.

As a rule the burden of proof remains where the issue made by the pleadings places it,³² but where a person wishes to support his case by a particular fact which lies more particularly within his own knowledge, or of which he is supposed to be cognizant, then, so far as the particular fact is concerned the burden of proving same is upon him. And where the defendant offers an affirmative defense, either by showing title in himself or a stranger, the burden falls upon him and he is required to establish the fact which constitutes such defense in much the same manner as is required of the plaintiff in the first instance.³³

³² Blunt v. Barrett, 124 N. Y. 117.

³³ Horton v. Murden, 117 Ga. 72; Soper v. Guernsey, 71 Pa.

§ 240. **Order of proof.**—The case made by the plaintiff must, to a large extent, influence the nature and order of the defendant's proof. Where this consists merely of negations, or matters which go to rebut the plaintiff's evidence, the manner of presentation will in most cases be shaped by what has preceded. Where affirmative proof is offered the remarks respecting the relevancy of the plaintiff's proofs will apply, as the defendant, in such case, becomes for the purposes of the suit a claimant of title. But the defendant in ejectment, in establishing title in himself or another, has a right to commence anywhere in his chain of title he may see fit. If, when he is through, a link is wanting his case fails and the whole of his evidence must on motion be excluded from the jury.³⁴

§ 241. **Under the general issue.**—The defendant's pleadings are usually confined to the general issue of not guilty, or a general denial of the plaintiff's allegations. Under this plea, as a rule, the defendant will have a right to introduce in evidence any fact which may show, or tend to show, that the plaintiff had no right of entry when the suit was brought, or which may tend to defeat the plaintiff's claim of title.³⁵ Thus, he may always show a subsisting paramount title in a third person, and this will defeat the plaintiff's recovery.³⁶ Or, he may show a right of property and present possession in himself, either by a connected chain of title or by an adverse possession.³⁷ So, too, he may show that the deed under which plaintiff claims is void for want of capacity in the vendor,³⁸ or because it was made in violation of some positive provision of

St. 219; *Weaver v. Rush*, 62 Ark. 51; *Enos v. Cook*, 65 Cal. 175; *Grigsby v. Akin*, 128 Ind. 591; *Hartley v. Ferrell*, 9 Fla. 374.

³⁴ *Asher v. Mitchell*, 92 Ill. 480.

³⁵ *Sparrow v. Rhoades*, 76 Cal. 208; *Kimball v. Gearhart*, 12 Cal. 50; *Lain v. Shepardson*, 23 Wis. 224; *Stubblefield v. Borders*, 92 Ill. 279; *Wood v. Eckhouse*, 79 Ind. 354; *Fairbanks v. Long*, 91 Mo. 628.

³⁶ *Boyer v. Thornburg*, 115 Ill. 540; *Doswell v. De la Lanzo*, 20 How. (U. S.) 29; *Smith v. McCann*, 24 How. (U. S.) 398; *Bear Valley Coal Co. v. Dewart*, 95 Pa. St. 72.

³⁷ *Dutton v. Clark*, 59 S. C. 440; *Neal v. Spooner*, 20 Fla. 38; *Lum v. Reed*, 53 Miss. 73; *Prior v. Scott*, 87 Mo. 303.

³⁸ *Fitzgerald v. Shelton*, 95 N. C. 519.

law,³⁹ or that it was not delivered absolutely but as an escrow.⁴⁰

If the plaintiff claims as an heir, the defendant may show a deed or devise by the ancestor to a stranger,⁴¹ or that the claimant is a bastard, and hence without inheritable blood, or he may show that the ancestor by his own declarations did not claim title to the land.⁴² The admissions of an ancestor, which could affect him were he a party, are generally receivable in evidence against his heirs,⁴³ under the general principle that declarations of one in possession or claiming ownership, when made in disparagement of the title of the declarant, are admissible against him and those claiming in privity with him.⁴⁴

Where he defends against a purchaser at sheriff's sale, he may dispute the validity of the judgment and execution under which the sale and conveyance of his land was made, and thus destroy the purchaser's title.⁴⁵ This, however, would be the extent of his rights, for, as he is regarded in law as the real grantor he would not be permitted to dispute the purchaser's title.⁴⁶ If plaintiff claims by virtue of a tax deed he may negative the *prima facie* title made by its introduction by showing that the property was not subject to taxation for the year or years named, or that the taxes had been paid before the sale.⁴⁷

So, too, without disputing the plaintiff's title he may show that it confers no right of immediate entry,⁴⁸ and so strictly is this right construed that a plaintiff will be denied a recovery when it appears that at the time of the commencement of the suit his right of possession was intercepted by a temporary injunction obtained from a court of competent jurisdiction, al-

³⁹ *Sparrow v. Rhoades*, 76 Cal. 208.

⁴⁰ *Goff v. Roberts*, 72 Mo. 570.

⁴¹ *Brandt v. Livermore*, 10 Johns. (N. Y.) 358.

⁴² *Finch v. Garrett*, 102 Iowa, 381.

⁴³ *Terry v. Rodahan*, 79 Ga. 278; *Burnett v. Harrington*, 70 Tex. 213.

⁴⁴ *Willson v. Albert*, 89 Mo. 537; *Magee v. Blankenship*, 95

N. C. 563; *Rowell v. Doggett*, 143 Mass. 483; *Elgin v. Beckwith*, 119 Ill. 367.

⁴⁵ *Crenshaw v. Julian*, 26 S. C. 283.

⁴⁶ *Gould v. Hendrickson*, 96 Ill. 599.

⁴⁷ *Moore v. Byrd*, 118 N. C. 688.

⁴⁸ *Hurst v. Sawyer*, 2 Okla. 470.

though such injunction may have subsequently been dissolved and the bill dismissed.⁴⁹

It has been held, that the defendant may show that the deed under which plaintiff claims, although absolute in form, is, in fact, only a mortgage.⁵⁰ But this applies only in those states where equities may be shown by way of defense. In other states, where the strict rule that the legal title must prevail still obtains, such a defense could not be interposed⁵¹ and the deed would be given its legal effect. Where the defense is permissible it is still incumbent on the defendant to show an offer to redeem before the plaintiff can be deprived of his possession under the deed.⁵²

It is a further rule, that actions of ejectment are determined upon the facts as they existed at the times they were commenced. This applies as well to the defendant as to the plaintiff, and matters of defense arising after suit brought are not available under a plea of the general issue,⁵³ although, as heretofore shown,⁵⁴ they may in some cases be shown by a supplemental plea. This rule, which is fully in consonance with all of the rules of pleadings and evidence, has been infringed in some states,⁵⁵ but, generally, unless the circumstance is of a very peculiar character, as where the defendant has purchased the plaintiff's title pending suit,⁵⁶ the case must be tried and determined on the issues presented when the suit was commenced.

§ 242. Continued—Estoppels.—The remarks of the foregoing paragraph apply only where the relations of the parties are such that no estoppels can arise to interfere with the character or course of the proof. Where, however, the plaintiff sues as a landlord the defendant will ordinarily be estopped from disputing the plaintiff's title and the latter will not be required to show more than the lease under which defendant en-

⁴⁹ *Cofer v Schening*, 98 Ala. 338.

⁵⁰ *Dobbs v. Kellogg*, 53 Wis. 448; *Walls v. Endel*, 20 Fla. 86.

⁵¹ *McGinnis v. Fernandes*, 126 Ill. 228.

⁵² *Hughes v. Davis*, 40 Cal. 117.

⁵³ *Johnson v. Briscoe*, 92 Ind. 370.

⁵⁴ See § 214.

⁵⁵ See *Pollard v. Hanrick*, 74 Ala. 334; *Duggan v. McCullough*, 27 Colo. 43; *Roper v. McFadden*, 48 Cal. 346.

⁵⁶ *Hardin v. Forsythe*, 99 Ill. 312.

tered and the expiration of the tenancy.⁵⁷ But the defendant, in such case, while he may not deny the title under which he entered may still show that the plaintiff had no right of entry at the time suit was brought. Thus, he may show that the plaintiff's interest had expired,⁵⁸ as where he had sold and conveyed the land to a third party,⁵⁹ or where it had been sold on execution,⁶⁰ or at tax sale.⁶¹ There is also an exception to the general rule preventing a tenant from denying his landlord's title, and this occurs where he has been induced by artifice or fraud to accept the lease. In such case he may show a better title in himself, or in a third party under whom he claims.⁶²

But, while the rule is undisputed, that a tenant in possession is estopped from denying the landlord's title, yet this estoppel is available only for the recovery of possession. It is not equivalent to an admission of title in fee,⁶³ and, at best, admits nothing more than that the tenant's rights rest upon the corresponding rights in the landlord. The estoppel continues only so long as the lease remains in force, and if the tenant surrenders the possession he acquired under the lease, he is as free to dispute the landlord's title and to set up an independent right in himself as any other person.⁶⁴ One who enters into possession by the consent of the tenant is subject to the same estoppel, and cannot dispute the landlord's present right of recovery, but, like the tenant, he is bound no further.⁶⁵ Hence, either a tenant, or one coming into possession under him, may surrender the term to the lessor and may then re-enter and actively assert a title adverse to that of the landlord.

⁵⁷ *Cressler v. Cressler*, 80 Ind. 366; *Bertram v. Cook*, 44 Mich. 396; *Carter v. Marshall*, 72 Ill. 609.

⁵⁸ *Prestman v. Silljacks*, 52 Md. 647; *Hardin v. Forsythe*, 99 Ill. 312.

⁵⁹ *Supervisors v. Herrington*, 50 Ill. 232; *Otis v. McMillan*, 70 Ala. 46; *Grundin v. Carter*, 99 Mass. 15.

⁶⁰ *Lancashire v. Mason*, 75 N. C. 455; *Hardin v. Forsythe*, 99 Ill. 312.

⁶¹ *Miller v. Bonsadon*, 9 Ala. 317.

⁶² *Carter v. Marshall*, 72 Ill. 609.

⁶³ *Bertram v. Cook*, 44 Mich. 396.

⁶⁴ *Fuller v. Sweet*, 30 Mich. 237; *Page v. Kinsman*, 43 N. H. 328.

⁶⁵ *Lowe v. Emerson*, 48 Ill. 160; *Abbott v. Cromartie*, 72 N. C. 292; *Longfellow v. Longfellow*, 61 Me. 590; *Brenner v. Bigelow*, 8 Kan. 496; *Mattis v. Robinson*, 1 Neb. 3.

Another phase of estoppel is presented where a purchaser at execution sale sues the defendant in execution to recover possession of the lands sold. The legal theory is that the execution debtor is really the grantor and hence, that he will not be heard to deny his own grant. At all events, whatever may be the theory, the rule is that a purchaser at sheriff's sale takes exactly the same estate as was vested in the judgment debtor,⁶⁶ which he holds by the same title.⁶⁷ This being so it follows that when the debtor is sued in ejectment, by the purchaser under the execution, he is estopped to dispute the plaintiff's title.⁶⁸

There are cases which hold that the grantee of a husband is estopped from denying the seizin of the latter in an action of ejectment brought by the widow to recover dower,⁶⁹ but later cases have rejected this doctrine.⁷⁰

§ 243. Under special pleas.—The general nature of special pleas in ejectment, as well as the necessity therefor, have been discussed in the chapter on pleading, to which the reader is referred. Except in the case of an affirmative defense special pleas will rarely be required, but in some states even negative proofs, like the statute of limitations, must be specially pleaded to admit the introduction of evidence relating thereto. As a rule, pleading specially what is admissible under the general issue does not abridge the scope of the proof under the general issue,⁷¹ and the necessity for special pleas can arise only in a few cases.

Where the statute of limitations is pleaded specially the burden of proving that the cause of action in suit is barred by limitation rests upon the defendant,⁷² yet he may rely on plaintiff's proof to establish such defense.⁷³

⁶⁶ *Morgan v. Bouse*, 53 Mo. 219; *Williams v. Amory*, 16 Mass. 186.

⁶⁷ *Hicks v. Skinner*, 71 N. C. 539; *Cameron v. Logan*, 8 Iowa, 434.

⁶⁸ *Gould v. Hendrickson*, 96 Ill. 599.

⁶⁹ *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290; *Davis v. Darrow*, 12 Wend. (N. Y.) 65.

⁷⁰ *Sparrow v. Kingman*, 1 N. Y. 242.

⁷¹ *Gregory v. Tomlinson*, 68 Vt. 410, 35 Atl. Rep. 350.

⁷² This is simply a statement of the general rule that where the defendant asserts a fact upon which he tenders an affirmative issue, the burden is upon him to establish such fact.

⁷³ *Noel v. Noel*, 93 Va. 433.

§ 244. **Inconsistent defenses.**—While a defendant is now generally permitted to plead as many matters of fact in several pleas as he may deem necessary for his defense, the rule still is that he must preserve consistency. An issue must be presented and the proof offered in support of same must not be contradictory. Hence, a plea of not guilty and a disclaimer should not be joined, as the two are inconsistent,⁷⁴ and, usually, where pleas of this kind are filed the defendant will not be permitted to give evidence of a disclaimer when by his plea of the general issue he has admitted a possession under claim of title.

§ 245. **Affirmative defenses.**—The defendant is not confined to merely negative testimony. He may also set up a substantive claim of right in himself, in which event he in turn becomes a claimant and the title so asserted is to be proved in the same manner and is subject to the same conditions as though he was the plaintiff in the action. All of the remarks heretofore made with respect to the plaintiff's claim apply with equal force to the assertions of the defendant whenever he resorts to an affirmative defense, and he will never be permitted to defend his possession against the plaintiff upon a title in himself by which he could not recover the possession if he were out and the plaintiff in possession.⁷⁵

The general rule, that the burden of proof rests upon him who holds the affirmative, would seem to apply to a defendant as to the issues tendered by him in the allegations of new matter in his plea or answer, upon which he holds the affirmative, although in some of the cases the idea has been very much obscured by subtle distinctions between the burden of proof and the weight of evidence. But, even where this rule applies without question, it is still incumbent on the plaintiff to establish a *prima facie* case for recovery by his allegations and proofs, before he can require defendant to sustain the affirmative allegations of his answer.⁷⁶

A defendant may avail himself of any legal defense, and where such defense assumes an affirmative character he is not

⁷⁴ *McQueen v. Lampley*, 74 (U. S.) 750; *F. A. Hihn Co. v. Ala.* 408. *Fleckner*, 106 Cal. 95.

⁷⁵ *Hickey v. Stewart*, 3 How. ⁷⁶ *Bryant v. Groves*, 42 W. Va. 10.

compelled to rely upon one title but may show as many as he has been able to acquire. Thus, if he has purchased the same land from two different persons, he may, if sued in ejectment by a third person, rely on either or both of the titles he has purchased.⁷⁷ In every event, however, he must show a paramount right, and if he relies upon an adverse claim he will be obliged to make such a case as shall effectually displace or overcome the title proved by the plaintiff.⁷⁸

§ 246. **Outstanding title in stranger.**—As previously shown, a defendant in ejectment is always at liberty to show that the legal title, or present right of possession, is vested in a third person, and thus prevent a recovery.⁷⁹ In such event it is immaterial that the defendant may fail to connect himself with such outstanding title.⁸⁰ It is enough for him to show that some person other than the plaintiff has a better right to the land,⁸¹ and if this shall be done it effectually bars the further maintenance of the action. But, where an outstanding title in a stranger is relied upon as a defense, it devolves upon the defendant to prove that such title is not only paramount to the one asserted by the plaintiff but that it is still subsisting and enforceable.⁸² In other words, it must be of such a character that, if asserted by action, it would enable the stranger to recover the land in controversy from both the plaintiff and the defendant,⁸³ although some cases hold that it is sufficient if it is subsisting and valid as against the plaintiff at the time of trial, but need not be so as against the defendant.⁸⁴ It has further

⁷⁷ Ford v. Harrison, 69 Ark. 205, 86 Am. St. 192, 62 S. W. Rep. 59; Kahn v. Mining Co., 2 Utah, 174.

⁷⁸ Griffin v. Mulley, 167 Pa. St. 339.

⁷⁹ Boyer v. Thornburg, 115 Ill. 540; Bear Valley Coal Co. v. Dewart, 95 Pa. St. 72; Price v. Cooper, 123 Ala. 392; Dyke v. White, 17 Colo. 296; Lee v. Clary, 38 Mich. 223.

⁸⁰ Cobb v. Lavalle, 89 Ill. 331; Trenouth v. Gordon, 63 Cal. 379; Guilmartin v. Wood, 76 Ala. 204.

⁸¹ Bear Valley Coal Co. v. De-

wart, 95 Pa. St. 72; Jenkins v. Railway Co., 109 Ga. 35.

⁸² Clayton v. Feig, 179 Ill. 540; Robinson v. Thornton, 102 Cal. 675; Bernstein v. Humes, 71 Ala. 260.

⁸³ C. & E. I. R. R. Co. v. Clapp, 201 Ill. 418; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 474; Putnam v. Tyler, 117 Pa. St. 570, 12 Atl. Rep. 43; Reusens v. Lawson, 91 Va. 226; Freeman v. Cunningham, 57 Miss. 67.

⁸⁴ Henderson v. Wanamaker, 79 Fed. Rep. 736; Humble v. Spears, 8 Baxt. (Tenn.) 156;

been held, that a defense of an outstanding title, with which the defendant does not connect himself, is overcome by proof that since the beginning of the action such title has ceased to exist.⁸⁵

A deed fraudulent on its face and therefore void, cannot be used to defeat a recovery in ejectment, by showing an outstanding title;⁸⁶ and, generally, anything that serves to impeach the outstanding title will prevent it from being used to support the defendant's possession.⁸⁷

To the foregoing rule there seems to be an exception in the case of a trespasser, or one who enters without color or claim of title, and it has frequently been held that a mere intruder cannot enter upon a person actually seized and eject him, and then question the title of the latter or set up an outstanding title in another.⁸⁸

A further exception is made where the plaintiff sues as a purchaser at sheriff's sale to recover from the execution defendant. In such cases it has been held that the defendant will not be permitted to show an outstanding paramount title in a third person. The reason for this is, that the sheriff, in making a sale of all the defendant's right, title and interest in the land, acts merely as the defendant's agent; that the defendant, in fact, makes the conveyance through the agency of the sheriff, and hence, the law will not permit him to say, in defense of his possession, that there is a better title in some other person than that which he has conveyed to the purchaser at the sheriff's sale.⁸⁹ But if the defendant in execution abandons the land, and afterwards returns to it and is then sued in ejectment, a different rule will apply. In such case he may show an outstanding title, provided he further shows that he has taken possession and holds under it, and his grantee may avail himself of the same defense.⁹⁰

Bennett v. Horr, 47 Mich. 221;
McDonald v. Schneider, 27 Mo.
405.

⁸⁵ Robinson v. Thornton, 102
Cal. 675, 31 Pac. Rep. 936.

⁸⁶ Forsythe v. Hardin, 62 Ill.
206.

⁸⁷ See Griffin v. Sheffield, 38
Miss. 359; Tatten v. James, 55
Mo. 494; Wilson v. Broden, 48
W. Va. 196.

⁸⁸ Christy v. Scott, 14 How.
(U. S.) 282; Sullivan v. Eddy,
164 Ill. 396; Sparks v. Conrad,
99 Ga. 643; Foot v. Murphy, 72
Cal. 104.

⁸⁹ Crenshaw v. Julian, 26 S.
C. 283.

⁹⁰ Gould v. Hendrickson, 96
Ill. 599.

§ 247. **Outstanding title by lease.**—The rule is fundamental that a plaintiff in ejectment cannot recover, notwithstanding he has title to the lands in controversy, when the legal right to the immediate possession thereof is vested in another. Under this rule a lessor of lands cannot recover the demised premises during the term, or while the lessee has the right of possession under the lease, even against one not claiming under such lease.⁹¹ As a defendant in ejectment may always show a right of possession in a third person, and thus defeat a recovery, so he may show an undetermined outstanding lease, although he does not connect himself with it, and this will constitute a substantial defense to the action.⁹²

§ 248. **Outstanding mortgage.**—In a few states the ancient doctrine with respect to mortgages is still retained in a modified form and the effect of instruments of this kind, when they are brought in question in an action at law, is according to their legal import. But even where this doctrine prevails it has been shorn of much of its ancient significance and its operation confined to parties to the mortgage or their privies. Hence, an outstanding mortgage with which the defendant fails to connect himself, is no defense in an action of ejectment.⁹³ As to strangers the mortgagor is regarded as the owner of the property, and a mortgage made by the plaintiff in an action of ejectment does not show an outstanding title which will defeat the action.⁹⁴

§ 249. **Outstanding easement.**—The doctrine of outstanding titles, as a defense to an action of ejectment, has no application to special privileges that may be exercised on the land by third persons. Hence, a mere easement in a third person is no bar to an action by the owner against a stranger.⁹⁵

§ 250. **Adverse possession.**—Where the common-law practice prevails, proof of title by adverse enjoyment and possession is generally permitted under the plea of the general is-

⁹¹ Cobb v. Lavalley, 89 Ill. 331.

⁹² Cobb v. Lavalley, 89 Ill. 331.

⁹³ Emory v. Keighman, 88 Ill. 482; Dunton v. Keel, 95 Ala. 159; Johnson v. Cornett, 29 Ind. 59; Burr v. Spencer, 26 Conn. 159.

⁹⁴ Hall v. Lance, 25 Ill. 277;

Moreau v. Detchmندی, 41 Mo. 431; Cotton v. Carlisle, 85 Ala. 175; Dimon v. Dimon, 10 N. J. L. 156.

⁹⁵ Talum v. St. Louis, 125 Mo. 647; Lott v. Payne, 82 Miss. 218.

sue,⁹⁶ but in many of the code states a special plea of title is required when the defendant relies upon an affirmative defense. But in such cases it would seem that it will only be necessary for him to allege that he is the owner in fee of the land in dispute and lawfully seized of the same, and that under such plea he may prove upon the trial that he has been in the open and notorious possession of the land for the requisite statutory period of limitation.⁹⁷ This proof, however, cannot be made by statements of the defendant that he has been in open, notorious and actual possession of the disputed land. Such evidence is simply the mere opinion of the witness on a material issue of fact, which issue it is the province of the jury to settle under instructions from the court.⁹⁸

In all cases the burden of establishing an adverse possession is cast upon the party who asserts it against the holder of the legal title,⁹⁹ and he will be required to prove all of the facts requisite thereto.¹ He must satisfy the jury, by the weight of evidence, that he or those under whom he claims entered into possession at such time prior to the commencement of the action as will make the requisite period of adverse holding under the statute, and that such possession was uninterruptedly continued from that time. He must further show the elements of notoriety, hostility, and exclusiveness in his occupation, together with the limits, location and extent thereof. These are the general requirements in all states, but in some states the burden is rendered still more onerous by a statutory presumption that every occupation is in subordination to the legal title. Where this rule prevails the presumption can only be overcome by clear and convincing proof.²

§ 251. **Claim by descent.**—As before remarked the onus of proving his claim of title rests upon the plaintiff and

⁹⁶ *Horne v. Carter*, 20 Fla. 45; *Brace*, 38 Fla. 265, 20 So. Rep. 991.
⁹⁷ *Fulkerson v. Mitchell*, 82 Mo. 13.

⁹⁸ *Rogers v. Miller*, 13 Wash. 36, 18 So. Rep. 20; *Griffin v. Mulley*, 167 Pa. St. 339.
⁹⁹ *And see Stiff v. Cobb*, 126 Ala. 381; *Briscoe v. Holder*, 111 Ga. 877.

¹ *Wilkins v. Pensacola*, 36 Fla. 36, 18 So. Rep. 20; *Griffin v. Mulley*, 167 Pa. St. 339.
² *See Allis v. Field*, 89 Wis. 327, 62 N. W. Rep. 85; *Barrs v. Brace*, 38 Fla. 265, 20 So. Rep. 991.

⁹⁹ *Watrous v. Morrison*, 33 Fla. 261.
⁹⁹ *McConnell v. Day*, 61 Ark. 464, 33 S. W. Rep. 731; *Barrs v.*

when he asserts a right of ownership by virtue of a descent from a former proprietor he is required to satisfactorily establish all of the various steps that lead to the right of property and possession, irrespective of any defense on the part of the defendant. Nor is it necessary that any affirmative defense be made, for the party disputing the descent may confine himself solely to a falsification of the plaintiff's testimony. He may show any infirmity in the plaintiff's pedigree, as that there is no connection with the ancestor's title; that other and more nearly related heirs are living; that the ancestor was never married; that he died without issue; that plaintiff is a false claimant, or any other matter or thing that puts in issue the right or title which the claimant asserts. He may attack the title asserted by showing a deed from the ancestor to a stranger, or a will which has been duly proved whereby the land is devised to others, or any other circumstance that may tend to invalidate the plaintiff's claim.

On the other hand, he may assert a right of inheritance in himself and by showing that his ancestor died in possession of the land under a claim of ownership and color of title make a *prima facie* case in his own favor. The elements of descent and the proofs necessary to establish them, are fully discussed in a subsequent chapter.

§ 252. **Against breach of condition.**—It is asserted that a breach or nonperformance of a condition annexed to a grant is not a reversion, though often treated as such. In other words, that it does not create an estate in the land, but simply a right of action, and, if enforced, the person entering is in by a forfeiture and not by reverter. It is unnecessary, however, to discuss this phase of the subject. For all of the practical purposes of the action of ejectment we may regard it as a reverter and the grantor as occupying the position of a reversioner.

It is generally conceded that a grantor, in conveying land, has a right to annex to his grant any condition he may desire that is not subversive of any rule of public policy, so long as it does not defeat the grant itself, and, in the case of a condition subsequent, to enter and repossess himself of such land in the event that the condition shall be broken. In the further event that such entry shall be resisted he may secure possession by

ejectment. It is contended, however, that the imposition of conditions, the breach of which will work a forfeiture, must be for some honest and beneficial purpose, and not to secure an unjust advantage to the grantor, and that where this latter is made to appear a forfeiture will be denied. Thus, a grantor has a right to insert in his deed a condition that the grantee shall not make or vend intoxicating liquors upon the premises. This condition has frequently been sustained and is within the public policy of most of the states.³ But, it seems, courts will not enforce such a condition when its purpose is to enable the grantor to obtain a monopoly of such business by restraining others from engaging in it, and this fact, if proved, would be a perfect defense to an action brought to recover the land because of a breach of the condition.⁴

§ 253. **Ejectment for dower.**—The right to bring ejectment for the recovery of dower was once freely conceded and special provision was made by statute for suits of this character. At present, however, the right is recognized in only a few states and the tendency is to further limit it. It would seem that where this form of the action is permitted the defendant is at liberty to show in his defense that the husband was not seized during the marriage of an estate of inheritance, and thus defeat the claim.⁵ There are some ancient cases which deny this, and which maintain that so long as the defendant holds under a title derived from the husband he is estopped from denying the husband's seizin when sued in ejectment for dower by the widow.⁶ But this rule has been set aside in states where it had formerly prevailed⁷ and it is doubtful whether it possesses any efficacy at this time.

§ 254. **Fraud and circumvention.**—It is a cardinal principle of law that, as between the parties and those in-privity with them, fraud vitiates all acts into which it enters. It is a

³ *Smith v. Barrie*, 56 Mich. Y. 242; *Small v. Procter*, 15 314; *Sioux City, etc. R. R. Co.* Mass. 495.

v. Singer, 49 Minn. 301; *Plumb v. Tubbs*, 41 N. Y. 442.

⁴ *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 13 Am. St. 420.

⁵ *Sparrow v. Kingman*, 1 N.

⁶ See *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290; *Hamblin v. Bank*, 19 Me. 66; *English v. Wright, Cox* (N. J.) 437.

⁷ See *Sparrow v. Kingman*, 1 N. Y. 242.

further rule, that fraud is cognizable in a court of law as well as in equity. In fact, the jurisdiction of the two courts is almost equal so far as respects their right to try and determine questions of fraud, notwithstanding their means of proving fraud are not equal and their mode of granting relief is widely different. The superior facilities of a court of equity to investigate the question and grant relief, render it frequently advisable to resort to that court at once, but a party may still avail himself of such relief as a court of law may afford, and where it can be shown that the title of the claimant had its inception in fraud, it is generally competent for the defendant to avail himself of the fact as a defense to the action. This principle, which seems to have found a recognition at a comparatively early period, has always been consistently maintained and the books abound with cases where, in actions of ejectment, an apparently valid title is treated as a nullity because it was obtained by fraud.⁸ Hence, if a party has been induced to execute a deed by some fraudulent artifice, as where it was misread and its contents falsely stated, or where a different paper than the one he intended to sign has been surreptitiously imposed upon him, this fact, if proved, would justify a court in pronouncing the fraudulent deed a nullity and of no effect as a conveyance, and in an action of ejectment brought upon such deed it would be competent for the defendant to show such fact.⁹ So, too, where a subsequent purchaser has notice of a prior conveyance of the same land his deed may be avoided in action at law when an attempt is made to predicate rights upon it.¹⁰ Indeed, so general has this rule become that courts of law will even investigate questions of fraud where there has been no fraud in fact but merely in law, and objections of this character may be made available in actions of ejectment and without recourse to a court of equity.¹¹

⁸ *Rogers v. Brent*, 5 Gilm. (Ill.) 573; *Jackson v. Burgott*, 10 Johns. (N. Y.) 457; *Morris v. Gill*, 1 Chip. (Vt.) 49; *Escherick v. Traver*, 65 Ill. 379; *Eaton v. Eaton*, 37 N. J. L. 108. But see *contra*, *Harriett v. Kinney*, 44 Mich. 457.

⁹ *Jamison v. Beaubien*, 3 Scam. (Ill.) 113; *Kirkpatrick v. Clark*, 132 Ill. 342.

¹⁰ *Jackson v. Burgott*, 10 Johns. (N. Y.) 457.

¹¹ *Den v. McKnight*, 6 Halst. (N. J.) 385.

There is, however, a distinction between equitable and legal fraud, and where this distinction continues to find recognition there are certain fraudulent practices that cannot be set up to defeat the title at law. Thus, misrepresentations, or false statements, would not be received where there is no question with respect to the execution of a deed, and, generally, all such forms of fraud as relate only to the consideration are cognizable only in equity.¹² In states where equitable defenses of every kind may be interposed, no question will arise, and the decisions, in such states, are numerous and harmonious in declaring that invalidity of title by reason of fraud may always be shown in ejectment.¹³

Usually, in order that a defendant may avail himself of a defense of this character, it is necessary that he should be innocent of any fraudulent intent, but it is also a rule that parties *in pari delicto* are without a remedy against each other, and hence, notwithstanding the defendant may have been a participant in the fraud which he charges, it may still be successfully urged as a defense to the plaintiff's claim. As, where a deed is executed without consideration and for the purpose of defrauding creditors, if the grantor is suffered to remain in possession, the law will leave the parties as it finds them; the defendant, although he participated in the wrongful act, may still plead and show the mutual fraud and the plaintiff will be denied a recovery.¹⁴

§ 255. **Equities—At common law.**—It is a rule of general and uniform observance, wherever the common law prevails, that in ejectment neither equitable titles nor equitable defenses can avail either party as a basis of recovery or defense.¹⁵ Equitable interests are enforceable only in an equitable proceeding where they can be properly investigated, and, notwithstanding the legal title against which they are opposed may

¹² *Escherick v. Traver*, 65 Ill. 379.

¹³ See *Cheney v. Crandell*, 28 Colo. 383; *Stebbins v. Kay*, 123 N. Y. 31.

¹⁴ *Kirkpatrick v. Clark*, 132 Ill. 342; *Harrison v. Hatcher*, 44 Ga. 638.

¹⁵ *McKay v. Williams*, 67

Mich. 547; *Barrett v. Hinckley*, 124 Ill. 32; *Jackson v. Deyo*, 3 Johns. (N. Y.) 422; *Buell v. Irwin*, 24 Mich. 145; *Kennedy v. Johnson*, 69 N. C. 249; *Phillips v. Blasdel*, 8 Nev. 61; *Morton v. Grenn*, 2 Neb. 441; *Williams v. Peters*, 72 Md. 584; *Johnson v. Pontious*, 118 Ind. 270.

have been acquired through actual or constructive fraud, it must first be attacked and declared void by an action in chancery.¹⁶ At law the courts deal only with the legal title, and will not inquire as to who is the beneficial owner of the property.¹⁷ This rule, in the absence of specific statutory provisions to the contrary, is inflexible and unyielding and is to be strictly enforced whenever occasion shall arise for its application.¹⁸ Under some circumstances a court of law may investigate questions of fraud, and, when proved, treat a deed as a nullity and hence of no effect as a conveyance of title, as where a party has been induced to execute a deed, supposing it to be another paper, or where a different paper has been surreptitiously exchanged for the one he intended to execute, but, in general, it will not go behind the naked legal title and inquire where the equities are.¹⁹

§ 256. Continued.—Qualifications of the rule.—It must be understood, however, that the rule, as above stated, applies only where the legal title has been fully established and evidence of an equitable title is sought to be introduced to overthrow the same. If the plaintiff is without title, or claims under a title which is shown to be invalid,²⁰ or asserts only a right of possession under color of title that would be effective only as against a mere intruder, a different rule will prevail, and it seems that in such event a defendant in possession may show in defense of the action an equity unconnected with and independent of the plaintiff's claim.²¹ So, too, while courts of law take no cognizance of equitable estates and deal only with legal

¹⁶ Walker v. Kynett, 32 Iowa, 524; Rountree v. Little, 54 Ill. 323. But see § 254.

¹⁷ Mulsford v. Tunis, 35 N. J. L. 256; Edwards v. Miller, 4 Helsk. (Tenn.) 314; Grubbs v. Boone, 201 Ill. 104.

¹⁸ See Leonard's Lessee v. Diamond, 31 Me. 536; Beal v. Harmon, 38 Mo. 435; Garther v. Lawson, 31 Ark. 279; Nelson v. Triplets, 81 Va. 236; Moody v. Farr, 33 Miss. 192; Deitzler v. Mishler, 37 Pa. St. 82; Johnson

v. Watson, 87 Ill. 535; Eaton v. Smith, 19 Wis. 537; Trumbull v. Simmons, 17 Ala. 411; Shaw v. Hill, 83 Mich. 322; Johnson v. Pontious, 118 Ind. 270.

¹⁹ Peece v. Allen, 5 Gilm. (Ill.) 236; Wakefield v. Van Tassell, 202 Ill. 49; Shaw v. Hill, 83 Mich. 322; Morgan v. Blewett, 72 Miss. 903.

²⁰ McKay v. Williams, 67 Mich. 547.

²¹ Shaw v. Hill, 83 Mich. 322.

titles, yet, as against a mere intruder, the plaintiff would be entitled to recover, even though without title, by a simple showing of prior possession,²² and without reference to the validity or sufficiency of the muniments of title which he might produce.²³

With this qualification, however, the rule is beyond dispute, and as a corollary thereof it is further laid down that not only must the prevailing party possess the legal title but he must have had it at the commencement of the suit. A title acquired subsequent thereto is unavailing.²⁴ Yet to this latter statement there is also an apparent exception where the subsequent title is but a consummation of a prior inchoate title. Under the doctrine of relation it may then be admitted to repel the attack on the previous inchoate right,²⁵ but this is about the only instance in which it can be employed, and even this right has in some cases been denied.²⁶

§ 257. Continued—Under the statute.—The blending of legal forms of action and the abolition, or attempted abolition, of the distinction between law and equity, which now prevails in many states, has done much to unsettle the long received rules relative to the production of evidence in actions for the establishment of title and recovery of lands. While the codes have to a certain extent obliterated the distinctive forms of action, the principles which govern them remain much the same, and while law and equity are administered in the same tribunal, and frequently in the same action, the courts, as a rule, have carefully preserved the underlying principles which distinguish the two systems and apply them in much the same way that was customary prior to the union.

The observations of the preceding section may be regarded as the settled law of the country, both in the common law and code states, except that in some of the latter a broad construction of the code on the one hand or specific statutory enact-

²² Wilson v. Glenn, 68 Ala. 383; Shaw v. Hill, 83 Mich. 322.

²³ Wilson v. Glenn, 68 Ala. 383.

²⁴ Goodman v. Winter, 64 Ala. 411.

²⁵ Green v. Jordan, 83 Ala. 220.

²⁶ See Paul v. Fries, 18 Fla. 573.

ments on the other, have broken the force of the old rule by permitting equitable defenses, and, in some cases, equitable claims. This innovation, for such it must be considered irrespective of whatever merit may attach to it, originated in the western states and territories and undoubtedly grew out of the practice of the general government in dealing with the public lands. Possession was always given upon entry at the land office and the receiver's receipt was frequently the only muniment of title desired or used. The patent did not issue until a long interval of time had elapsed and in thousands of cases was never called for. Hence it was that the receipt for the purchase money came to possess the potency of a deed, and was allowed to vest in the purchaser such a title to and interest in the land as would enable him to maintain ejectment therefor against any intruder into his possession.²⁷

The precedent thus established has led to legislation in many states which has materially changed the general doctrine as previously stated, and equitable defenses, in such states, are permitted to be interposed in contravention of the legal title.²⁸ Where this rule obtains,—and it has received a general recognition in a number of states that have adopted reformed codes of civil procedure,—a defendant in an action of ejectment may interpose an equitable defense, and the issues thus raised may be tried and determined directly in the same action, without having to resort to an independent suit in equity.²⁹

It would further seem, that where an equity may be brought before the court, such relief may be granted as the equity may seem to require. Thus, a defendant, for the purpose of defeating the plaintiff's recovery, may have the plaintiff's deed corrected by excluding therefrom the land in question, where it appears that it was included in such deed by mistake;³⁰ or he

²⁷ See *Truelock v. Taylor*, 26 Ark. 54; *Stanway v. Rubio*, 51 Cal. 41; *Prentiss v. Brewer*, 17 Wis. 635; *Crary v. Goodman*, 12 N. Y. 506; *Neil v. Keese*, 5 Tex. 23.

²⁸ This would seem to be the rule in California, Texas, New York, Wisconsin, Missouri, Oregon, Arkansas, Indiana,

²⁹ *St. Louis v. Lumber Co.*, 98 Mo. 613; *Hyde v. Mangan*, 88 Cal. 319; *Spaur v. McBee*, 19 Oreg. 76; *Prentiss v. Brewer*, 17 Wis. 635; *Neil v. Keese*, 5 Tex. 23; *Crary v. Goodman*, 12 N. Y. 506; *Williams v. Murphy*, 21 Minn. 534; *East v. Pedin*, 108 Ind. 92 N. E. Rep. 722.

³⁰ *Hoppough v. Struble*, 60 N.

may have the deed set aside as a cloud upon title so far as it relates to such land.³¹ This is certainly a wide departure from the old rules, but where a court is permitted to acquire jurisdiction for all purposes in an action of ejectment, and to make all orders respecting the title, there is, perhaps, no incongruity in permitting it to quiet defendant's title by a reformation of the deed upon which plaintiff bases his demand, which, unaided by extraneous proof, gives color to the plaintiff's claim.

But while a defendant may interpose his own equities to defeat a recovery, and, if the facts shown are such as in a court of chancery would work a denial of plaintiff's claim, may have a verdict in his own favor, yet this would appear to be the limit of his rights in this respect. He cannot show the equities of strangers. Thus, he cannot defend on the ground that a third party, with whom he is not in privity, is the equitable owner of the land.³²

§ 258. **Theory of equitable defenses.**—It will be remembered that the action of ejectment, in its evolution from a mere action of trespass, was largely influenced by equitable principles which the common law courts adopted, and that, in many of its phases, it partakes of an equitable character. But notwithstanding this, the rule that legal titles only would be considered in determining the rights of the litigants long prevailed in all of its unbending rigidity, and whatever of departure there may be from the strictness of the rule depends almost wholly on legislation. Under the modern codes a defendant is now permitted to bring forward any defense which he may have to the plaintiff's action, whether it be legal or equitable or both. This follows from the abolition of the distinction between actions at law and suits in equity and the merging of all forensic contests into a single form of civil action. Where this has been done the question in an action is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or an equitable defense against the plaintiff's claim, but whether, according to the whole law applicable to the case the plaintiff makes out the right which he seeks to establish or the defend-

Y. 430; *Green Bay, etc. Canal Co. v. Hewitt*, 62 Wis. 316.

³¹ *De Forest v. Walters*, 153 N. Y. 229, 47 N. E. Rep. 294.

³² *East v. Pedin*, 108 Ind. 92.

ant shows that the plaintiff ought not to have the relief sought for.³³ This would seem to be the interpretation of the law relating to procedure in those states where but one form of action exists, and, while the fundamental distinction of law and equity may remain, the distinction between legal and equitable actions has been so far abolished as to permit a defendant, in an action to recover the possession of land founded on a legal title, to allege and prove that he is the equitable owner.

§ 258a. **Equities in the federal courts.**—In the courts of the United States the rule seems to be inflexible and without exception, that suits for the recovery of land can be maintained only upon a legal title³⁴ to which is united a present right of possession;³⁵ and that incipient equities, even though sufficient to sustain the action under state statutes in the courts of the state in which the federal court is sitting, are insufficient to authorize a recovery.³⁶ The principle that equitable interests can be enforced only in equity, where they can be properly investigated with due regard to the rights of others, seems to be applied in unbending rigidity.³⁷

In the judicial system of the general government the distribution of law and equity powers is sharply defined, the distinction between them is marked, and the administration of those powers conforms closely to the practice that prevailed generally prior to the adoption of the codes. The distinction between law and equity being preserved, it follows that a party who claims legal title must seek relief at law, or if an equitable one, then according to the rules which regulate proceedings in equity. It is true, that in legal proceedings the practice and

³³ *Crary v. Goodman*, 12 N. Y. 266.

³⁴ *Morehouse v. Phelps*, 21 How. (U. S.) 294; *Swayze v. Burke*, 12 Pet. (U. S.) 11; *Smith v. McCann*, 24 How. (U. S.) 398.

³⁵ *Cincinnati v. White*, 6 Pet. (U. S.) 431; *Dickerson v. Colgrove*, 100 U. S. 578; *Kirk v. Hamilton*, 102 U. S. 68.

³⁶ *Morehouse v. Phelps*, 21 How. (U. S.) 294; *Sheirburn v. DeCordova*, 24 How. (U. S.)

423; *Claggett v. Kilbourne*, 1 Black. (U. S.) 346; *Oaksmith v. Johnston*, 92 U. S. 343. As where a deed, by reason of an imperfect description, is not effectual to convey the land, although it may be reformed in equity, it will not sustain an action of ejectment. *Prentice v. Stearns*, 113 U. S. 435.

³⁷ *Carpenter v. Montgomery*, 13 Wall. (U. S.) 480.

forms of the state courts may be followed, and in many states there is no formal distinction between cases at law and in equity. But although the forms of practice in the state courts have been adopted in law cases, yet such adoption must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit.³⁸ Hence, it would seem, that whatever may be the laws of the state courts in this respect, they do not govern proceedings in the courts of the United States.³⁹

§ 259. **Character of equities set up.**—Where a defendant is permitted to set up his equities against the plaintiff's demand, based upon a legal title, they should, as a rule, be of such a character as, under the old practice, would justify a court of equity in enjoining the legal owner from proceeding at law, upon a bill filed for that purpose.⁴⁰ The facts alleged must not, however, make such a defense as is available to the defendant in the common law action, and it seems that the court in such a case would be justified in refusing to allow such a plea to be filed, or in striking it out if filed.⁴¹

§ 260. **Estoppels in pais.**—In connection with the general subject discussed in the paragraphs immediately preceding and growing out of the conclusions therein reached, the question is suggested as to how far a defendant in ejectment may avail himself of an equitable estoppel to defeat the plaintiff's right of recovery upon a legal title. To this question, however, no positive answer can be returned, and local policy, as a rule, must determine the rights of the parties in this respect whenever the question is raised.

³⁸ *Bennett v. Butterworth*, 11 How. (U. S.) 669.

³⁹ In the act of congress to "establish the judicial courts of the United States" the distribution of law and equity powers is frequently referred to, and by the sixteenth section of that act, as if to place the distinction between those powers beyond misapprehension, it is provided "that suits in equity shall not be maintained in either of the courts of the United States in

any case where a plain, adequate and complete remedy may be had at law," at the same time affirming and separating the two classes or sources of judicial authority. See *Fena v. Holme*, 21 How. (U. S.) 481.

⁴⁰ *Williams v. Murphy*, 21 Minn. 534; *Johnson v. Drew*, 34 Fla. 130.

⁴¹ *Dickson v. Gamble*, 16 Fla. 687; *Johnston v. Allen*, 22 Fla. 224.

In consonance with the old and long established rules of the action it has been held in many of the states that neither party may invoke estoppels *in pais* in order to defeat the legal title to permanent interests in land,⁴² and that relief of this character must be sought for in equity.⁴³ This is practically but a restatement of the common law doctrine with respect to equitable titles, and, where the common-law rule prevails, if there has been no fraud, an estoppel will not be permitted to interfere with the assertion of a legal title.⁴⁴ Thus, a mistake of fact honestly made by the plaintiff as to the location of the boundary line of his lot, by which he was induced to assent to the placing of a wall thereon by the defendant, will not operate to estop the plaintiff from asserting his title thereto in an action of ejectment.⁴⁵

In many of the states an equitable estoppel is available by way of defense at law as well as in equity,⁴⁶ and may be given in evidence in actions of ejectment under the plea of the general issue.⁴⁷ The same rule has been announced in some cases in the federal courts,⁴⁸ particularly when the matters relied on give a legal right to possession.⁴⁹ The principal objection to the admission of this kind of testimony is, that it contravenes the general rule that title to land cannot be extinguished or transferred by acts *in pais* or by oral declarations. It became a rule of property in courts of equity, however, at a very early period, that where a man remains silent when good faith requires him to speak, he cannot afterward be heard to say that that is not true which his conduct unmistakably declared was true, and upon the faith of which others have acted. The rule

⁴² Winslow v. Cooper, 104 Ill. 235; Linnertz v. Dorway, 175 Ill. 508; Hayes v. Livingstone, 34 Mich. 384; Shaw v. Chambers, 48 Mich. 355; Tolman v. Sparhawk, 5 Met. (Mass.) 469.

⁴³ Grubbs v. Boone, 201 Ill. 98; Stone v. Perkins, 85 Fed. Rep. 616.

⁴⁴ Tolman v. Sparhawk, 5 Met. (Mass.) 469.

⁴⁵ Proctor v. Putnam Mach. Co., 137 Mass. 159. And see Linnertz v. Dorway, 175 Ill. 508.

⁴⁶ See Dickerson v. Commissioners, 6 Ind. 128; Shawhan v. Long, 26 Iowa, 488; Meeker v. Dalton, 75 Cal. 154; Hurd v. Harvey County, 40 Kan. 92.

⁴⁷ Hogan v. Ellis, 39 Fla. 463; Tyler v. Hall, 106 Mo. 313.

⁴⁸ Dickerson v. Colgrove, 10 Otto (U. S.) 578; Kirk v. Hamilton, 12 Otto (U. S.), 68.

⁴⁹ Schoolfield v. Rhodes, 82 Fed. Rep. 153.

has never been departed from, and it is now an established principle that a party who has induced another to believe a certain state of facts to be true, either by his silence, declarations or acts, is estopped from denying its truth, where such course was intended to influence, and did influence, the conduct of the other.⁵⁰ Hence, where an owner of land fails to give notice of his title, under circumstances where the omission operates as a fraud, as where he suffers another to purchase and expend money on land under an erroneous belief respecting the title, he will not be permitted to exercise his legal right against such person.⁵¹ In other words, his conscience will be bound by an equitable estoppel.

But while this doctrine originated in a court of equity, where it is freely applied to all species of property, it has also long been employed in courts of law in matters pertaining to chattels. There is, however, no good reason, at this time and under the rules of modern practice, why its application should be restricted in courts of law. As has been well said, protection against fraud is equally necessary, whatever may be the interest at stake; and there is nothing in the nature of realty to exclude those wise and salutary principles which are now adopted without scruple, in both jurisdictions, in the case of personalty.⁵² Wherefore, we find a number of instances where a plea of equitable estoppel has been permitted to operate as a sufficient defense in an action of ejectment.⁵³

§ 261. Continued—Parol agreements respecting boundaries.—It is now a universally recognized rule, that adjoining proprietors may conclude themselves, with respect to coterminous boundaries, by parol agreements establishing a line in accordance with which they afterward hold.⁵⁴ This method of determining boundaries is frequently resorted to in cases of

⁵⁰ Blair v. Wait, 69 N. Y. 116; Abeel v. Van Gelder, 36 N. Y. 514; Markham v. O'Connor, 52 Ga. 183; Gray v. Bartlett, 20 Pick. (Mass.) 186.

⁵¹ Wendell v. Van Rensselaer, 1 Johns. Ch. (N. Y.) 344; Evans v. Snyder, 64 Mo. 516; Markham v. O'Connor, 52 Ga. 183.

⁵² 2 Smith, L. Cas. 733.

⁵³ Kirk v. Hamilton, 12 Otto (U. S.) 68; Jarvis v. Lynch, 157 N. Y. 445.

⁵⁴ Henderson v. Dennis, 177 Ill. 547; Turner v. Baker, 64 Mo. 218; Thaxter v. Inglis, 121 Cal. 593.

doubt, where the true line is in dispute or unknown, and when an agreement of this kind is followed by possession, the line so fixed is generally held to be binding and conclusive on the immediate parties and all others who claim by, through, or under them.⁵⁵ But where the distinction between law and equity is preserved, this procedure is regarded only as a method of settling the extent of ownership, and not as passing the title to land.⁵⁶ Hence, where the legal title is in question the estoppel of the agreement has been held inoperative in an action of ejectment and unavailable as a defense.⁵⁷ Where this doctrine obtains, it would seem that a defendant who seeks to avail himself of the estoppel is required to apply to a court of equity for necessary relief. In such event he would be entitled to an injunction restraining the further prosecution of the ejectment suit until the suit in equity could be heard and determined.⁵⁸ On the other hand, where estoppels *in pais* are received in evidence in legal actions, they may be relied upon as a defense in ejectment, and, it has been held, may be shown under the general issue.

§ 262. **Equitable mortgage.**—It is a general and well established rule, that a conveyance of land in any form, intended merely as a security for a debt or the performance of an obligation, will be taken and treated in equity only as a mortgage and will be subjected to the incidents of a mortgage. But at law the instrument must be given its declared effect,⁵⁹ and, in those states where the distinction between law and equity has been preserved, in an action of ejectment by the grantee of a deed absolute on its face, against the grantor in possession, such deed cannot be impeached by a showing that it was intended by the parties as a mortgage security. In such event the deed must stand for what, on its face, it purports to be, and the remedy of the grantor, if any, is in equity. There he may show the true character of the instrument and obtain such relief against it as

⁵⁵ Cutler v. Callison, 72 Ill. 113.

⁵⁶ Grubbs v. Boone, 201 Ill. 98.

⁵⁷ Hayden v. McCloskey, 161 Ill. 351; Proctor v. Putnam Mach. Co., 137 Mass. 159. But

compare Kuglin v. Bock, 181 Ill. 165.

⁵⁸ Grubbs v. Boone, 201 Ill. 98; Duggan v. Uppendahl, 197 Ill. 179.

⁵⁹ Bragg v. Massie's Adm'r, 38 Ala. 89.

the necessities of his case may demand, including an order enjoining the ejectment suit.⁶⁰

In many states, however, the ancient rule above stated has been abrogated by statute or the operation of civil codes, and the equitable doctrine is made to apply in all cases.⁶¹ In these states, a conveyance, absolute in form, but intended as a mortgage, transfers no title to the grantee. In such event, as the grantee is without title, it follows that he cannot maintain ejectment upon his deed and the facts which fix the character of the conveyance may be shown in the ejectment suit.⁶²

§ 263. **Easements—Rights of way.**—As a general rule a municipal corporation may always defend ejectment at the suit of the owner of the fee, by setting up possessory rights in a street or common acquired by virtue of a dedication to public uses, and the same rule, in some instances, has been held to apply to *quasi*-public corporations. But in a case where the servitude is a mere private easement the rule is otherwise. Usually, the existence of an easement, as in the case of a right of way, will not justify an exclusive possession of the servient land, and the fact that the defendant is the owner of such easement is no defense to an action of ejectment by the owner of the fee. The right to a fee and the right to an easement in the same land are each independent of the other and may well subsist together at the same time when vested in different persons. In such case each owner may maintain an action to vindicate and establish his own right, the former to protect and enforce his seizin of the fee, the latter to prevent a disturbance of or interference with his easement, and a recovery in either case will not affect or impair the rights of the other.⁶³

⁶⁰ *Finlon v. Clark*, 118 Ill. 32; *McGinnis v. Fernandes*, 126 Ill. 228.

⁶¹ *Turner v. McDonald*, 76 Cal. 177; *Bank v. Mathews*, 45 Neb. 659; *Perot v. Cooper*, 17 Colo. 80.

⁶² *Snyder v. Parker*, 16 Wash. 276; *Smith v. Smith*, 80 Cal. 323.

⁶³ *Morgan v. Moore*, 5 Gray (Mass.) 319; *Hoboken Land Co. v. Hoboken*, 36 N. J. L. 540; *Burnet v. Crane*, 56 N. J. L. 285.

III. WHERE BOTH PARTIES CLAIM FROM A COMMON SOURCE.

§ 264. General doctrines.

265. Extent of proof—Denial
of claim.§ 266. Defendant's assertion of
outstanding title.

267. Effect of former adjudication.

§ 264. **General doctrines.**—It will often happen that both plaintiff and defendant base their respective claims upon the same root, and when this occurs the order and extent of proof is materially affected. It is a well established rule of the action that, where plaintiff and defendant both claim from a common source of title, it is sufficient for the plaintiff, in the first instance, to deduce his title therefrom without going further,⁶⁴ and the rule applies with the same force whether both parties claim by descent or by purchase.⁶⁵ In such event, in order to insure a recovery, it is only necessary for the plaintiff to show that he has a better title from the common source;⁶⁶ no evidence of a prior investiture of title in such common source is necessary,⁶⁷ nor is it competent, as a general proposition, for either party to deny the validity of the original title through which they both claim.⁶⁸ Where it is shown that both parties derive title from the same person, the nature of such original common title becomes immaterial, so far as the rights

⁶⁴ Myrick v. Wells, 52 Miss. 149; Miller v. Hardin, 64 Mo. 545; Spect v. Gregg, 51 Cal. 198; Cronin v. Gore, 38 Mich. 381; Orton v. Noonan, 19 Wis. 350; Lake Erie, etc. R. R. Co. v. Whitham, 155 Ill. 514; Cox v. Hart, 145 U. S. 376; Sellman v. Hardin, 58 Tex. 86.

⁶⁵ Myrick v. Wells, 52 Miss. 149.

⁶⁶ Union Bank v. Manard, 51 Mo. 548; McCready v. Lansdale, 58 Miss. 877; Smith v. Laatsch, 114 Ill. 271; Lasater v. Van Hook, 77 Tex. 650; Carson v. Dundas, 39 Neb. 503; Luen v.

Wilson, 85 Ky. 503; Drake v. Happ, 92 Mich. 580.

⁶⁷ Butcher v. Rogers, 60 Mo. 138; Doe v. Dugan, 8 Ohio, 87; Bishop v. Truett, 85 Ala. 376; Glover v. Thomas, 75 Tex. 505; Frink v. Roe, 70 Cal. 296; Stalford v. Goldring, 197 Ill. 162.

⁶⁸ Whissenhunt v. Jones, 78 N. C. 361; Ames v. Beckley, 48 Vt. 395; Merchants' Bank v. Harrison, 39 Mo. 433; Roosevelt v. Hungate, 110 Ill. 595; Lewis v. Watson, 98 Ala. 479; Schwalback v. Railway Co., 69 Wis. 292; Christenbury v. King, 85 N. C. 229; Doyle v. Wade, 23 Fla. 90.

of the contending parties are concerned, nor is it necessary that such original title be established by documentary evidence; it may be shown by parol.⁶⁹ When this has been done the plaintiff will only be required to show a connected title from the common source down to himself, and if he shows the superior title, even though not altogether free from objections, he will be entitled to recover, unless a paramount outstanding title is shown in another.⁷⁰ This latter observation brings up the only matter of practical difficulty in the general statement above made and a consideration of the questions which it involves is reserved for further discussion later on.

The rule of estoppel above discussed, where both parties claim through a common source of title, is not an arbitrary fiction of law.⁷¹ It is founded in sound legal reason and follows as a logical deduction. Thus, if two parties claim title from A, it must be conceded by them that A had title, otherwise they would not claim under him. This being so, it is unnecessary to consume time in proving what both admit to be true. All that is left is to determine who has A's title, either directly or through mesne conveyances.⁷² It will be seen, therefore, that in cases of this kind, the comparative strength of the titles asserted by the parties is the ultimate test by which the question of recovery is to be determined.⁷³

§ 265. **Extent of proof—Denial of claim.**—In the earlier stages of practice in this class of cases, the plaintiff, in order to relieve himself from the burden or danger, as the case might be, of deducing title from its original source, was bound to show not only his own claim of title back to the common source, but that of the defendant also, and if, upon this showing, the plaintiff appeared to have the better title he was permitted to recover, but not otherwise.⁷⁴ To remove the difficulties of such a course, as well as to simplify the action, the statute, in some

⁶⁹ *Smith v. Lindsey*, 89 Mo. 76; *Finch v. Ullman*, 105 Mo. 258. *rell*, 109 U. S. 608; *Gaines v. New Orleans*, 6 Wall. (U. S.) 642.

⁷⁰ *Smith v. Laatsch*, 114 Ill. 271. ⁷³ *Wallace v. Jones*, 93 Ga. 419; *Wade v. Thompson*, 52 Miss. 367.

⁷¹ *Alexander v. Gibbon*, 118 N. C. 796, 54 Am. St. 757. ⁷⁴ See *Holbrook v. Brenner*, 31 Ill. 501.

⁷² *Alexander v. Gibbon*, 118 N. C. 796; *Robertson v. Pick-*

states, permits the plaintiff to allege, under oath, that he claims title through a common source with the defendant, and, in such event, it will be sufficient for him to show his own title from such common source, unless the defendant shall deny, on oath, that he also claims therefrom, or will swear that he claims through some other source. The effect of such a statute is, not to cut off the plaintiff's common-law right to show the two chains of title devolving from the common source, but merely to relieve him from the burden of proving defendant's claim as well as his own. If the defendant denies by counter affidavit that he claims from the alleged common source, the burden still remains, just as it did before, of proving both claims.⁷⁶

Where the defendant denies that he claims from the same source as the plaintiff, the latter may show that he does so claim, by introducing in evidence the various deeds connecting him with such alleged common source; and it is no objection to the exercise of this right that the evidence offered proves the defendant's title to be worthless.⁷⁶ If the defendant does not deny that he claims under the source named, the plaintiff is not required to prove that fact.⁷⁷ Where the defendant denies a derivation of title from the same source as the plaintiff the effect of such denial is to throw upon the plaintiff the burden of proving both chains of title back to the common source, and of showing that he possesses the better right to the land.⁷⁸

§ 266. **Defendant's assertion of outstanding title.**—When the plaintiff has proved that he and the defendant claim title to the land in controversy from a common source, and that of the two titles emanating from that source his is the superior, he shows a *prima facie* right to recover.⁷⁹ But, notwithstanding the proof of the insufficiency of his title under the common source, the defendant may still defeat the action by showing that there is a title superior to that of the person or persons under whom both parties claim, and that he is the holder of this title.⁸⁰ It has been intimated that, even without showing that

⁷⁶ *Smith v. Laatsch*, 114 Ill. 271; *Bradley v. Lightcap*, 201 Ill. 513.

⁷⁸ *Bradley v. Lightcap*, 201 Ill. 513.

⁷⁶ *Bradley v. Lightcap*, 201 Ill. 513.

⁷⁹ *Bradley v. Lightcap*, 201 Ill. 513; *McWhorter v. Hetzel*, 124 Ind. 129.

⁷⁷ *Smith v. Laatsch*, 114 Ill. 271.

⁸⁰ *Rice v. Railroad Co.*, 87 Tex. 90; *Christenbury v. King*, 85 N.

he holds such superior title, his defense should prevail if he shall affirmatively prove that some one had the title anterior to that of the common source, and that such previous title never vested in such common source.⁸¹ The weight of authority, however, would seem to indicate that where the plaintiff has proved that both parties claim from the same root, and that his is the superior title emanating therefrom, the defendant, in order to defeat a recovery, must not only show that there is an outstanding paramount title, but must connect himself with that title.⁸² In case of his failure so to do the outstanding title becomes an immaterial circumstance.⁸³

The principle upon which the decisions which uphold the foregoing doctrine seem to proceed is that of estoppel. It is said that evidence that the defendant claims title under the common grantor is *prima facie* proof that such grantor had the title at the time he undertook to convey the right which the defendant claims; this necessarily involves the assumption that he had acquired the title of all previous owners.⁸⁴ Each party, it is held, is estopped to deny this fact, unless he has acquired the paramount title from a third person not bound by the estoppel.⁸⁵ This theory, while it has been severely criticised, does not seem to have been successfully assailed and is usually of controlling efficacy in all controversies in which it is invoked. In some of the states it is fixed by statute.

But as a defendant may avail himself of any legal defense, and has an undoubted right to purchase as many outstanding claims of title as he may see fit, it follows that where he has bought the same land from two different persons he may, if

C. 229; *Cooke v. Avery*, 147 U. S. 375; *Ford v. Harrison*, 69 Ark. 205, 86 Am. St. 192, 62 S. W. Rep. 59; *Wade v. Thompson*, 52 Miss. 367; *Sell v. McAnaw*, 138 Mo. 267.

⁸¹ See *Rice v. Railway Co.*, 87 Tex. 90.

⁸² *Cooke v. Avery*, 147 U. S. 375; *Cox v. Hart*, 145 U. S. 376; *Caldwell v. Neely*, 81 N. C. 114; *Ames v. Beckley*, 48 Vt. 395; *Smith v. Lindsey*, 89 Mo. 76; *Lewis v. Watson*, 98 Ala. 476;

McCready v. Lansdale, 58 Miss. 877; *Sell v. McAnaw*, 138 Mo. 267.

⁸³ *Horning v. Sweet*, 27 Minn. 277; *Butcher v. Rogers*, 60 Mo. 140; *Bolling v. Teel*, 76 Va. 493; *Spect v. Gregg*, 51 Cal. 200; *Burns v. Goff*, 79 Tex. 236.

⁸⁴ *Rice v. Railway Co.*, 87 Tex. 90.

⁸⁵ *Caldwell v. Neely*, 81 N. C. 114.

sued in ejectment by a third person, rely on either or both of the titles he has purchased. The fact that he may have purchased a title emanating from the common source does not preclude him from setting up a title acquired from another source, and if such independent title shall be superior he will have a perfect defense.⁸⁶

§ 267. **Effect of former adjudications.**—Analogous to the matters discussed in the preceding paragraphs is the nature and extent of the proof required where both parties, even though claiming from different sources, have yet submitted their disputes to a competent tribunal by which they have been adjusted and settled. This is well illustrated in the case of tenants in common who submit their respective claims, and the rights which they involve, to the judgment of a court in an action of partition. Where, in such a case, the rights of all of the parties in the land have been presented, passed upon and determined, it necessarily follows that the determination of the issues so made up is final and conclusive upon all parties to the action, and hence, in an action of ejectment thereafter brought by one of the parties in the former action against the other, the judgment or decree entered in the partition suit would be competent and conclusive evidence of title,⁸⁷ and the trial of the ejectment suit would proceed upon practically the same lines as though the parties both rested their claim on a common source.⁸⁸

IV. DISPUTED BOUNDARIES.

- § 268. General observations.
- 269. The original survey.
- 270. Monuments and land-marks.
- 271. Parol evidence.

- § 272. Oral agreements.
- 273. Common repute.
- 274. Hearsay — Declarations of persons deceased.

§ 268. **General observations.**—No small amount of the litigation of land titles grows out of the disputes of co-terminous proprietors with respect to boundaries, and the location

⁸⁶ Ford v. Harrison, 69 Ark. 205; Wade v. Thompson, 52 Miss. 367; Burns v. Goff, 79 Tex. 236.

⁸⁷ Hancock v. Lopez, 53 Cal. 362.

⁸⁸ Wright v. McCormick, 77 N. C. 158.

and position of boundary lines is frequently the only point involved in the case. Where the original monuments are still in the field they control, and it will seldom happen, in such cases, that a resort to litigation becomes necessary when no other questions are presented. But where the monuments have become lost or obliterated difficult problems often arise, and it is under these circumstances that most of the actions for possession are brought. In some instances the suit grows out of mutual mistakes in the running of lines and placing of land marks. In others an encroachment by one of the parties is the gist of the action. The questions involved in ejectment suits arising out of disputed boundaries are many and often perplexing and in this connection no more will be attempted than to show, in a general way, the character and extent of the proof that is required to establish rights thus affected. Possession under a claim of right and its effect in the trial of disputed titles is reserved for more ample discussion in that part of the work which treats of adverse possession and limitation.⁸⁹

In a contest concerning the true boundary line between adjacent owners, and, generally, when in a dispute concerning boundaries there exists any doubt with respect to monuments, courses or lines, these are all issues of fact to be determined by the jury from all of the evidence.⁹⁰

§ 269. **The original survey.**—In all of the states and territories carved out of the public domain disputes as to the boundary of land are governed by the government survey, in the absence of any statute to the contrary. In such cases the field notes and plats of the original surveyor are the primary and controlling evidence of boundary, and the lines of sections and their divisions must be referred to and settled by the original survey.⁹¹ In establishing an original line of survey, according to the field notes thereof, attention is first given to the calls for natural or artificial monuments, and, if these are not found, then to courses and distances, with the variation of the needle from the true meridian as indicated, and, in all cases,

⁸⁹ See § 440 *et seq.*, *post*.

⁹⁰ *Taylor v. Fomby*, 116 Ala. 621; *Fitzgerald v. Brennan*, 57

Conn. 511; *Menasha v. Lawson*, 70 Wis. 600.

⁹¹ *Taylor v. Fomby*, 116 Ala. 621.

the lines as actually run by the original survey will govern if the monuments and corners then established can be proved.⁹²

An original map to which reference is made in a deed is always admissible for the purpose of establishing the boundary line of the premises conveyed,⁹³ and it has been held that maps may be introduced in evidence upon the question of the location of boundaries, in connection with the testimony of the witnesses who made them from their own notes of survey and as explanatory of their testimony, although such maps are not authenticated in the manner required by law with reference to the platting of lands or laying out additions to towns.⁹⁴

§ 270. **Monuments and landmarks.**—It is a settled rule in construing a description of land that monuments, whether natural or artificial, will control courses and distances.⁹⁵ Hence, if different parts of a description of boundaries conflict, recourse should be had to known and visible monuments, if any such there are, and they will be preferred to courses, distances, or other measurements.⁹⁶ In all cases of disagreement as to lines and distances, monuments set by the original survey and named or referred to in the plat, are the highest and best evidence that can be adduced. If there are no calls of this kind, or if the monuments have disappeared, then stakes set by the surveyor to indicate corners or the lines of streets, are the next best evidence. Fences, or other structures, erected according to such stakes, and while they were still in place, will become monuments after the stakes have been removed, and will constitute the next best evidence of the true line.⁹⁷

§ 271. **Parol evidence.**—The general rule is that a survey, when the lines in fact were actually run upon the ground, may

⁹² Watrous v. Morrison, 33 Fla. 261; Majors v. Rice, 57 Mo. 384; Bauer v. Gottmanhausen, 65 Ill. 499; Hess v. Meyer, 73 Mich. 259.

⁹³ Olsen v. Rogers, 120 Cal. 225.

⁹⁴ Justen v. Schaaf, 175 Ill. 45.

⁹⁵ Taylor v. Fomby, 116 Ala. 621; King v. Brigham, 19 Oreg.

560; Richardson v. Chickering, 41 N. H. 381.

⁹⁶ Adair v. White, 85 Cal. 314; Redmond v. Stepp, 100 N. C. 212; Bloom v. Ferguson, 128 Pa. St. 362; Scott v. Pettigrew, 72 Tex. 321; Crampton v. Prince, 83 Ala. 246.

⁹⁷ Racine v. Emerson, 85 Wis. 80; Johnson v. Archibald, 78 Tex. 96.

always be shown by proper evidence,⁹⁸ and for the purpose of ascertaining the boundaries of a grant a map of the survey, properly authenticated, is admissible.⁹⁹ Where the boundary is in dispute the testimony of the surveyor who established it may be received to show the location of monuments or stakes set by himself,¹ and he may state his own knowledge of its true position derived from his survey of the land.² Witnesses who were present and saw corners located by the original survey may testify to such fact,³ and their testimony, if uncontradicted, will prevail over a new survey made years afterward.⁴

As a general proposition, parol evidence is admissible to show the boundaries by which a lot was purchased, when the deed does not in any way give a specific description thereof,⁵ and where monuments are lost or destroyed those who saw and recognized them while in place may testify to such facts and the evidence should go to the jury as an aid in solving the question of primary location.⁶

The declarations of deceased disinterested persons who were in a position to know the actual facts have also been held competent evidence to establish a boundary,⁷ while the declarations of a prior owner, made while in possession, are always admissible against a party claiming under him.⁸

§ 272. **Oral agreements.**—While the title to land cannot be transferred by mere oral agreement, yet, if the boundary between contiguous lands is uncertain and in dispute, and the respective owners agree upon a fixed and certain line as a boundary, then, if the agreement is followed by actual occupation, and particularly where improvements are made on the faith of the agreement, the line so fixed will be binding on the

⁹⁸ *Johnson v. Archibald*, 78 Tex. 96.

⁹⁹ *Payne v. English*, 79 Cal. 540; *Racine v. Emerson*, 85 Wis. 80.

¹ *Racine v. Emerson*, 85 Wis. 80; *Arneson v. Spawn*, 2 S. Dak. 269.

² *Wineman v. Grummond*, 90 Mich. 280.

³ *Mills v. Penny*, 74 Iowa, 172.

⁴ *Racine v. Emerson*, 85 Wis. 80.

⁵ *Diggs v. Kurtz*, 132 Mo. 250.

⁶ *Arneson v. Spawn*, 2 S. Dak. 269; *Baker v. McArthur*, 54 Mich. 139; *Coy v. Miller*, 31 Neb. 348.

⁷ *Tucker v. Smith*, 68 Tex. 473.

⁸ *Austin v. Andrews*, 71 Cal. 98; *Potter v. Waite*, 55 Conn. 236.

parties and their successors in title.⁹ In such event it is immaterial that the line so agreed upon may, in fact, change the line called for in the deeds,¹⁰ for parties have a right to end a dispute by a verbal agreement, and when this has been done in good faith and a line is definitely fixed as the true line, they will thereafter be estopped from asserting anything to the contrary.¹¹ Nor is such an agreement obnoxious to the statute of frauds, nor to the rule forbidding the introduction of parol evidence to contradict a deed,¹² and the same may be given in evidence under the general issue.¹³ This point is not altogether clear, however, and local decisions, depending on the legal policy of the state of the forum, may at times militate against it.¹⁴

§ 273. **Common repute.**—It must sometimes happen that the only available evidence as to boundaries and lost monuments is the common repute of a neighborhood. There appears to be considerable difference between the English and American doctrines with respect to the admission of evidence of common repute on the question of boundaries. In England, it would seem, the rule which admits such evidence confines it to cases of boundaries that are matters of public or common interest, such as the boundaries of counties, parishes or manors, but the American decisions, in many instances, go far beyond this and extend the scope of the rule so as to permit it to apply to cases of purely private boundaries, where no one has any interest in the question other than adjoining owners.

The original rule rests on necessity, better evidence of the boundary having ceased to exist, and is justified on the theory that where many persons, members of a community, are interested in a common boundary, they will know where it is, and their common assent will prove what they know.¹⁵ As

⁹ *Watrous v. Morrison*, 33 Fla.

261; *Cutler v. Callison*, 72 Ill.

113; *Turner v. Baker*, 64 Mo.

218; *Clark v. Hulsey*, 54 Ga.

608; *Thaxter v. Inglis*, 121 Cal.

593.

¹⁰ *Diggs v. Kurtz*, 132 Mo. 250.

¹¹ *Cutler v. Callison*, 72 Ill.

113. Compare *Pickett v. Nelson*,

79 Wis. 9.

¹² *Lecompte v. Toudouze*, 82 Tex. 208.

¹³ *Diggs v. Kurtz*, 132 Mo. 250.

¹⁴ See *Grubbs v. Boone*, 201 Ill. 98.

¹⁵ *Thoen v. Roche*, 57 Minn.

135; *Taylor v. Fomby*, 116 Ala. 621.

coming fully within the reason of the rule it has been held, that evidence of common repute as to a boundary established under the United States system of surveys is competent to establish the facts where the monuments originally set have disappeared,¹⁶ and the same principle has been applied to the streets and blocks of cities,¹⁷ as well as to suburban lands.¹⁸

While the rights of parties with respect to boundaries will not be concluded by evidence of this character, nor by traditionary evidence generally, yet in the effort to establish ancient and obliterated landmarks it must often happen that such evidence must be resorted to.¹⁹

§ 274. Hearsay—Declarations of persons deceased.—

While the law, under a choice of difficulties, permits the introduction of evidence of common reputation to establish boundaries which are in dispute, this has not affected the general integrity of the rule which excludes hearsay, and when evidence of this kind is offered, it must, as a rule, be rejected. But the rule excluding hearsay has long been subject to several exceptions, and when the evidence, although hearsay, can be brought within the exceptions it may yet be competent. Thus, declarations made by a deceased person, concerning facts presumably within his knowledge, if relevant to the matter of inquiry, are admissible in evidence in suits between third parties, when it satisfactorily appears that the declarant is dead; that the declaration was against his pecuniary or proprietary interest; was of a fact in relation to a matter of which he was personally cognizant, and that he had no probable motive to falsify the fact declared.²⁰ Where these facts appear the declarations are admissible, irrespective of the question as to

¹⁶ *Thoen v. Roche*, 57 Minn. 135; *Mills v. Penny*, 74 Iowa, 172; *Arneson v. Spawn*, 2 S. Dak. 269. And see *Racine v. Emerson*, 85 Wis. 80.

¹⁷ *Ralston v. Miller*, 3 Rand (Va.) 44; *Racine v. Emerson*, 85 Wis. 80.

¹⁸ *Beaubien v. Kellogg*, 69 Mich. 333; *Mills v. Penny*, 74

Iowa, 172; *Arneson v. Spawn*, 2 S. Dak. 269.

¹⁹ *Baker v. McArthur*, 54 Mich. 139; *Coy v. Miller*, 31 Neb. 348; *Tucker v. Smith*, 68 Tex. 473.

²⁰ *Halvorsen v. Lumber Co.*, 87 Minn. 18, 91 N. W. Rep. 28, 94 Am. St. 669; *Field v. Boynton*, 33 Ga. 239; *Mahaska County v. Ingalls*, 16 Iowa, 81.

whether any privity existed between the declarant and the parties to the suit.²¹

In controversies concerning boundaries the exception has further been extended to include declarations not strictly against interest, provided it is shown that the declarant was in a position to possess information on the subject and had no apparent interest to misrepresent.²² This was always the rule at common law in cases involving questions of general or public interest, but proof of this kind was received in matters concerning private lines only when the boundary in question was a public or *quasi* public one, with which the private right was coincident. In the United States, however, the constant tendency has been to disregard the ancient distinctions respecting public and private boundaries and to place all questions of this kind upon the same basis. It is said, that this tendency is the result of the necessity of resorting to evidence of this character by reason of the constant destruction of landmarks in this country, and that in many cases it would be impossible to establish old boundaries without a resort to hearsay.²³ At all events, evidence of this kind is now freely received and while some of the cases contend that the declarant must, at the time of making the declaration, have been the owner or in possession of the land in question,²⁴ the better and more widely observed rule would seem to be, that such interest is not necessary and that the mere fact of knowledge as to boundaries, with no apparent inducement to misrepresent, is sufficient.²⁵

It is generally held that the declarations of surveyors,²⁶ or even of chainmen,²⁷ where such declarations were made upon

²¹ Friberg v. Donovan, 23 Ill. App. 62; Bartlett v. Patton, 33 W. Va. 72; Baker v. Taylor, 54 Minn. 73; Morton v. Folger, 15 Cal. 275.

²² Stroud v. Springfield, 28 Tex. 650; Morton v. Folger, 15 Cal. 275; Lawrence v. Tennant, 64 N. H. 532; Halsted v. Mullen, 93 N. C. 252.

²³ Stroud v. Springfield, 28 Tex. 650; Adams v. Stanyan, 24 N. H. 405.

²⁴ See Chapman v. Twitchell,

37 Me. 59; Long v. Colton, 116 Mass. 414; Curtis v. Aaronson, 49 N. J. L. 68, 7 Atl. Rep. 886.

²⁵ Smith v. Headrick, 93 N. C. 210; Tucker v. Smith, 68 Tex. 473; Cornwall v. Culver, 16 Cal. 424; Melvin v. Marshall, 22 N. H. 379.

²⁶ Bender v. Pitzer, 27 Pa. St. 333; Morton v. Folger, 15 Cal. 275; Adams v. Blodgett, 47 N. H. 219.

²⁷ Fry v. Stowers, 92 Va. 13.

the land and at the time of running lines, may be received to establish a boundary.

V. LANDLORD VS. TENANT.

§ 275. Introductory.	§ 278. Re-entry for non-pay-
276. Landlord's title, how	ment of rent.
proved.	279. Tenants' defenses.
277. Forfeiture of lease.	

§ 275. **Introductory.**—The action of ejectment, though now confined largely to the trial of disputed titles, was formerly a common remedy for landlords, on the determination of tenancies, to recover the possession of their lands from refractory tenants, and while the more speedy and summary action of unlawful detainer has generally superseded ejectment in matters of this kind, yet there are many cases in which the latter is still the appropriate remedy. In the paragraphs following it is proposed to briefly discuss the nature and extent of proof required where a landlord sues to regain possession and the defenses that may be interposed. The question of title is not usually raised in actions of this kind, but where the tenant repudiates the relation and claims under a right superior to that of his landlord, it may become the controlling factor of the case. In this latter event the general rules heretofore stated will apply with the same force as between other litigants. This section, however, assumes to treat only of the questions raised by the relation of landlord and tenant and of the means whereby the landlord's right of entry may be rendered effective. The general characteristics of the several phases of the relation, the nature of the tenancies that may be had in land, and ways in which tenancies are determined, are treated in the chapter relating to parties to the action, and to this the reader is referred.

§ 276. **Landlord's title, how proved.**—As a general proposition, for the purpose of proving the landlord's title in an action between him and his tenant, a lease from the former to the latter is competent and generally sufficient evidence.²⁸ It

²⁸ *Williams v. Walt*, 2 S. Dak. Summer, 61 Mo. 253; *Pope v.* 210, 39 Am. St. 768; *Silver v. Harkins*, 16 Ala. 321; *Alwood*

has been held, in some instances, that the relation is not proved by the mere production of the lease, but that the entry of the tenant thereunder, or a holding by him referable to it, must also be shown.²⁰ As this may easily be accomplished in the majority of cases it has become a general practice to introduce proof of this kind and because such proof serves to strengthen the plaintiff's contention the practice is eminently proper. It does not seem, however, that such latter proof is at all necessary, nor do the cases which have announced the doctrine seem to be sustained either by reason or authority, and the cases are numerous in which the defendant, although not acquiring possession from the plaintiff or through the lease, has yet been held bound thereby and estopped from denying the lessor's title.²⁰ If the defendant is in fact in possession, and this is shown, it does not seem, in order to claim the benefit of the estoppel, that it is necessary to show an entry and occupation under the lease other than by the recitals of the lease itself.

Where the lease is in writing, it is sufficient to produce same, and generally to show an entry thereunder, yet it is immaterial whether the lease was in writing or by parol, and, if the latter, a proof of entry under the landlord is sufficient. Any competent evidence which establishes the relation of landlord and tenant will preclude the tenant from denying the landlord's title,³¹ or from showing title either in himself or in a third person,³² while the rule which thus estops the tenant applies as well to all who claim by, through or under him.³³

§ 277. **Forfeiture of lease.**—As forfeiture of a leasehold interest in land, for breach of a covenant or condition, is neither implied nor favored in law, it follows that when a forfeiture is claimed it must be shown by affirmative proof.³⁴ A clause of forfeiture in a lease, is not, as a rule, self-executing,

v. Mansfield, 33 Ill. 452; Richardson v. Harvey, 37 Ga. 224.

²⁰ Caldwell v. Center, 30 Cal. 539.

³⁰ See Prevot v. Lawrence, 51 N. Y. 219; Thayer v. United Brethren, 20 Pa. St. 60.

³¹ Carson v. Broady, 56 Neb. 648; Richardson v. Harvey, 37

Ga. 224; Sage v. Halverson, 72 Minn. 294.

³² Williams v. Wait, 2 S. Dak. 210.

³³ Rose v. Davis, 11 Cal. 133; Blackney v. Ferguson, 20 Ark. 547; McCravey v. Remson, 19 Ala. 430.

³⁴ Williams v. Vanderbilt, 145 Ill. 283.

but requires the performance of some act by the person to be benefitted thereby, and this, as a further rule, must be shown whenever an advantage of this kind is sought.³⁵ The general rule also is, that a forfeiture must be enforced promptly,³⁶ or the right will be deemed to have been waived,³⁷ and slight circumstances have in many cases been treated as waivers.³⁸ Where the conduct of the landlord has been such as to induce a belief that a forfeiture is not intended, and the tenant has acted on such belief, an estoppel may arise that will preclude a forfeiture afterward.³⁹

§ 278. **Re-entry for nonpayment of rent.**—The power generally reserved in leases, allowing the landlord to re-enter upon the premises in case the rent shall remain in arrears for a certain time after it has become due, is a common proviso upon which ejectments for forfeiture for breach of covenant are founded. Formerly, however, this required a very technical procedure to render the power effective and a corresponding degree of strictness was necessarily involved in the proof.

It would seem that when provisions for re-entry were first introduced the law abounded in many subtleties and the preliminaries required, before a landlord could bring an ejectment for non-payment of rent, were so numerous that it was next to impossible for any person, not versed in the practice of the courts, to take advantage of a proviso of this nature. A demand of the rent was invariably required as a condition precedent to the action. This demand could only be made by the landlord in person or by his agent thereunto duly authorized; it was required to be of the exact sum due, and a penny in excess vitiated the demand; it was further required to be made upon the very day when the rent became due and payable and at some convenient time before sunset. It was a further re-

³⁵ *Miller v. Havens*, 51 Mich. Va. 385; *Garnhart v. Finney*, 40 Mo. 449.

482; *Wills v. Gas Co.*, 130 Pa. St. 222; *Read v. Tuttle*, 35 Conn. 25; *Walker v. Engler*, 30 Mo. 130.

³⁶ *Walker v. Engler*, 30 Mo. 130.

³⁷ *Bowman v. Foot*, 29 Conn. 231; *Thomas v. Hukill*, 34 W.

³⁸ *Moses v. Loomis*, 156 Ill. 392; *Johnson v. Douglass*, 73 Mo. 168.

³⁹ *Catlin v. Wright*, 13 Neb. 558; *Bowman v. Foot*, 29 Conn. 331; *Moses v. Loomis*, 156 Ill. 392.

quisite that the demand be made upon the land and at the most prominent place, and a demand in fact had to be made, notwithstanding there was no person on the land to pay it.⁴⁰ Nor were these the only vexatious difficulties to which a landlord was subject at common law, for the courts, notwithstanding his compliance with all the required formalities, would set the forfeiture aside upon payment of the debt and costs at any time before an execution had been served. This was substantially the law introduced into the American colonies and which, in some or all of its phases, prevailed for many years in all of the older portions of the United States.

For many years the matter of forfeiture for non-payment of rent has been regulated by statute in all of the states and the common-law rules have little application at the present time. Neglect to pay the stipulated rent is a breach of one of the conditions of the lease and a forfeiture is effected as in other cases of this kind by a notice to quit. The proof is made in the same manner as other forfeitures, as described in the preceding paragraph.

§ 279. **Tenant's defenses.**—It is fundamental that a tenant cannot dispute the title under which he entered, and where from any reason involving the termination of the tenant's estate, the landlord seeks to recover possession of the demised premises by an action of ejectment, no other or further proof of title is required than the simple fact of the making and accepting of a lease.⁴¹ This, as a general proposition, raises an estoppel which precludes the tenant from any assertion derogatory of the title of the lessor.⁴²

It would seem, however, that if the lessee was in possession at the time the lease was executed, he may, under certain circumstances, be permitted to prove that the land is his own, and thus resist the proceedings for eviction. As a reason for this

⁴⁰ See *Adams, Eject.* 149.

⁴¹ *Burke v. Hale*, 9 Ark. 328; *Hawes v. Shaw*, 100 Mass. 287; *Morrison v. Bassett*, 26 Minn. 235; *Hogsett v. Ellis*, 17 Mich. 351. And see cases cited under section 276.

⁴² *Springs v. Schenck*, 99 N. C. 551, 6 Am. St. 552; *Young v. Smith*, 28 Mo. 65; *Casey v. Hanrick*, 69 Tex. 44; *Robinson v. Holt*, 90 Ala. 115; *Heisen v. Heisen*, 145 Ill. 658; *Voss v. King*, 33 W. Va. 236.

it is said if the landlord fails he is not in a worse condition than he was before the lease. But, in order to give the tenant this right, it is necessary for him to prove that he accepted the lease in mistake, or that he was induced to accept it through some fraud or misrepresentation.⁴³ This doctrine has been distinctly announced in Pennsylvania, where actions of ejectment are regarded as of an equitable character, and a tenant is there permitted to avoid the legal effect of a lease by proof of such facts as would entitle him to relief in equity from any other obligation created by deed. In states where equitable defenses are permitted in legal actions the doctrine would seem to be followed, and in those states it would probably be competent for a defendant to show that the lease was made under such circumstances as would justify its annulment in equity.⁴⁴

Where such a course is permitted its effect would be to cancel the relation of landlord and tenant and free the defendant from its obligations. In this event he would, of course, be allowed to offer evidence tending to impeach the plaintiff's title.

But this seems to be the full limit of the doctrine. It is immaterial that the tenant did not enter under the lease, or that his title is superior to that of the landlord. If he deliberately recognizes the title of the landlord by accepting a lease he thereby becomes a tenant, and as such is estopped from disputing such title in this form of action.⁴⁵

⁴³ Thayer v. United Brethren, 210, 39 Am. St. 768.
20 Pa. St. 60.

⁴⁵ Williams v. Walt, 2 S. Dak.

⁴⁴ Williams v. Walt, 2 S. Dak. 210, 39 Am. St. 768.

CHAPTER IX.

TITLE BY DEED.

- I. ELEMENTS AND DERAIGNMENT.
- II. DEEDS OF OFFICIALS AND FIDUCIARIES.
- III. DEEDS OF PERSONS INCOMPETENT AND DISQUALIFIED.
- IV. DEEDS UPON CONDITION.
- V. DEFEASIBLE CONVEYANCES.

I. ELEMENTS AND DERAIGNMENT.

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| § 280. Generally considered. | § 295. Repugnant clauses and recitals. |
| 281. Requisites of deeds. | 296. Continued — Granting clauses and <i>habendum</i> . |
| 282. Form and contents. | 297. Signing by one not described as grantor. |
| 283. Unstamped deeds. | 298. Forged deeds. |
| 284. Proof of deeds. | 299. Fraudulent conveyance. |
| 285. Continued — Ancient deeds. | 300. Land held in adverse possession. |
| 286. Continued — Grantor's possession. | 301. Claimant under deed of bargain and sale. |
| 287. Continued — Technical defects — Acknowledgment. | 302. Claimant under quitclaim deed. |
| 288. Disabilities of coverture. | 303. Deeds to take effect at grantor's death. |
| 289. Deeds of corporations. | 304. Deed by donee of a power. |
| 290. Construction of deeds. | 305. Lost deeds. |
| 291. Identification of parties—Presumptions as to grantees. | 306. Continued — Presumption of lost deed. |
| 292. Description of the premises. | |
| 293. Identification of land after conveyance. | |
| 294. Limitation of the estate. | |

§ 280. Generally considered.—The most common method of establishing title to land, in all cases of controversy, is by the production of written instruments evidencing a transfer of proprietary rights, called, for short, *deeds*. This was one of the methods of acquiring an estate by purchase according to the

common law, and was technically known as *alienation*. The term, "alienation" seems at first to have been applied only to cases of voluntary transfer, but, in time, as the rights of creditors and lienors were extended and seizures of lands were permitted as well as of personal property, it took on a new meaning and now includes all methods whereby the estate of one person is conveyed to another by an act of present transfer, whether the transfer be voluntary or involuntary.

The substance, and frequently the form, of deeds of conveyance, are now prescribed by statute in most of the states, but where no specifications are made the rules of the common law with respect to the alienation of estates are generally of controlling efficacy. It is not proposed, nor is it necessary, to enter into a minute and circumstantial discussion of deeds, neither will the limits of this work admit of a detailed statement of the rules of conveyancing. In this chapter no more will be attempted than a general survey of the manner of proving title by deed in contests for the possession of land, and the nature, characteristics and operation of instruments of conveyance will receive only incidental allusion.

§ 281. **Requisites of deeds.**—To enable a deed to be introduced in evidence it must conform to statutory requirements respecting form, substance and method of execution. With respect to form, literal compliance is not essential, even where the statute prescribes a set phraseology, and a very informal instrument will be given effect where the intent is clear and the execution is in conformity to law. As a rule it must be signed—subscribed—by the grantor,⁴⁶ and, unless otherwise provided by statute, must be sealed.⁴⁷ These are the two essential facts of execution, which is completed by a delivery of the deed to the grantee. The method of signing is immaterial, so long as the name affixed is intended by the grantor to be his signature. That is, the signature may be appended by the grantor or by some other person acting for him,⁴⁸ and he may write his name

⁴⁶ *Goodman v. Randall*, 44 Conn. 325; *Jones v. Gurlie*, 61 Miss. 423. *Underwood v. Campbell*, 14 N. H. 393.

⁴⁷ *Alexander v. Polk*, 39 Miss. 737; *Floyd v. Ricks*, 14 Ark. 286; *Frost v. Deering*, 21 Me. 156; *Conlan v. Grace*, 36 Minn. 276; *Lewis v. Watson*, 98 Ala.

or only affix a mark.⁴⁹ The seal has degenerated into a mere scrawl and is regarded only as an arbitrary form. But, unless its use is dispensed with by statute, it is essential, and in all states where the distinction between sealed and unsealed instruments is preserved, sealing is still the criterion of a specialty. It is the seal which imparts special character to an instrument, and makes it in fact a deed.⁵⁰ Without a seal, where this formality is still required, the deed lacks legal sanction and the rights it may confer are cognizable only in equity. Hence, as the plaintiff in ejectment must recover upon a legal title it follows that the equitable title given by a deed without a seal is insufficient.⁵¹

Delivery is, if anything, more essential and important in legal theory than either signing or sealing,⁵² but in practice it presents fewer difficulties.⁵³ It requires no particular act or set phrase of speech and may be presumed, in proper cases, from very slight circumstances.⁵⁴ In fact, the mere possession of a deed duly executed and acknowledged is *prima facie* evidence of its delivery,⁵⁵ and imposes the burden of disproving delivery on the one denying it.⁵⁶ In such event the presumption of delivery can be overcome only by clear and convincing evidence,⁵⁷ and, in the absence of anything appearing to the contrary, it will further be presumed that the deed was de-

479; *Goodell v. Bates*, 14 R. I. 65.

⁴⁹ *Truman v. Love*, 14 Ohio St. 144; *Sellers v. Sellers*, 98 N. C. 13.

⁵⁰ *Alexander v. Polk*, 39 Miss. 737; *Taylor v. Morton*, 5 Dana (Ky.), 365; *United Copper, etc. Co. v. Franks*, 85 Me. 321; *Barrett v. Hinckley*, 124 Ill. 32.

⁵¹ *Gibbs v. McGuire*, 70 Miss. 646.

⁵² *Williams v. Baker*, 71 Pa. St. 476; *Howland v. Blake*, 97 U. S. 624; *Brown v. Brown*, 66 Me. 316; *Rogers v. Elch*, 146 Ind. 235; *O'Connor v. O'Connor*, 100 Iowa, 476, 69 N. W. Rep. 676.

⁵³ Acknowledgment of a deed is a circumstance tending to show delivery, but it is not conclusive evidence of that fact. *Ferguson v. Bond*, 39 W. Va. 561.

⁵⁴ *Hines v. Keighblinger*, 14 Ill. 469; *Connard v. Calgan*, 55 Iowa, 538; *Newlin v. Beard*, 6 W. Va. 110; *Kern v. Howell*, 180 Pa. St. 315; *Brown v. State*, 5 Colo. 496.

⁵⁵ *Devereux v. McMahon*, 108 N. C. 134; *Snodgrass v. Knight*, 43 W. Va. 294; *Wright v. Wright*, 77 Fed. Rep. 795.

⁵⁶ *Ward v. Ward*, 43 W. Va. 1.

⁵⁷ *Rohr v. Alexander*, 57 Kan. 381, 46 Pac. Rep. 699.

livered on the day of its date.⁵⁹ Circumstances, however, may rebut the presumption of delivery even though the deed is in the grantee's possession.⁶⁰

Where deeds are offered in evidence they will generally be received on proper proof of the foregoing essential facts,⁶¹ but, while the proof may establish the fact that the instrument offered is the deed of the person whose act it purports to be, this will be the full extent of its evidentiary value. The operation and effect of the instrument, as well as the quantity and nature of the interest granted, must appear and be determined from the terms therein employed, and its character as a conveyance, as a rule, can be shown in no other manner.⁶²

But a deed, standing by itself, is generally insufficient to prove title. Other essential facts must also appear, and notwithstanding that a deed may be regular in form and sufficient in substance, yet unless it is also shown that the grantor had been in possession of the land, or had at the time of conveyance a valid subsisting right of property therein, the deed does not even tend to prove any title in the grantee.⁶³

§ 282. **Form and contents.**—While the art of conveyancing was formerly one of great technical nicety, and while considerable technical skill is still required in limiting certain kinds of estates, yet, under the influence of later decisions and the destructive tendency of modern legislation, the form of instruments of conveyance is now of comparatively little moment. The authorities are all agreed that technical words are seldom required to effect a conveyance of land and that any words

⁵⁹ *Faulkner v. Adams*, 126 Ind. 459.

⁶⁰ Thus, a finding that a deed from a decedent to his son was never delivered is sustained by evidence that the grantee immediately after his father's death claimed no title to the land, and said that his mother could rent it to get money for her support, and sell it if she wanted to, and that he stood by while his father was making his will, knowing that he was attempting to devise such land as

his own, and claimed no title thereto, although the deed is in the grantee's possession. *Foley v. McNamara*, 93 Iowa, 707, 62 N. W. Rep. 26.

⁶¹ *Samuels v. Borrowscale*, 104 Mass. 207; *Keichline v. Keichline*, 54 Pa. St. 75.

⁶² *Lehndorf v. Cope*, 122 Ill. 317.

⁶³ *Lake v. Hancock*, 38 Fla. 58. And see *Florida, etc. R. Co. v. Loring*, 51 Fed. Rep. 932; *Crawford v. Corey*, 99 Mich. 415.

indicating an intention to transfer the interest or estate of the grantor will be sufficient for that purpose. Where this intention expressly appears, any apt word of conveyance will suffice and the deed is not required to be in any particular or exact form.⁶⁴

So, too, with respect to the limitation of estates. While estates are determined, as a rule, from the effect to be given to certain words, which are always inserted by careful and competent conveyancers, yet at the present time every grant of land will pass all the estate or interest of the grantor unless a different interest shall appear by express terms or necessary implication.⁶⁵

The requisites of the description of the parcel will be discussed in detail farther on. It is sufficient in this connection to say that a claimant in ejectment has the burden of proof to show that the land claimed is embraced by or included in the description of the deed under which the claim is made.⁶⁶

§ 283. **Unstamped deeds.**—At several times during our national life Congress has enacted laws requiring the affixment of revenue stamps to deeds of conveyance and providing penalties for a neglect of this duty. One of the penalties was that an unstamped instrument should not be received in evidence. But these laws, which were essentially revenue measures, have never been given practical effect by the states so far as they attempted to make a rule of evidence, and it has repeatedly been held that a deed or other instrument which has no revenue stamp upon it, or not the proper amount of stamps as required by law, is nevertheless admissible in evidence in the state courts.⁶⁷ The prohibitory provision can apply, if at all, only to courts of the United States, for Congress has no power

⁶⁴ *Evenson v. Webster*, 3 S. Dak. 382; *Watters v. Bredin*, 70 Pa. St. 235; *Cross v. Weare Com. Co.*, 153 Ill. 499. For an extreme construction of a deed, see *Harlowe v. Hudgins*, 84 Tex. 107.

⁶⁵ *Hawkins v. Chapman*, 36 Md. 83; *Lehndorf v. Cope*, 122 Ill. 317. This is the general

statutory rule. Consult local statutes.

⁶⁶ *Duff v. Moore*, 68 Tex. 270; *Hill v. Weir*, 33 Fed. Rep. 100.

⁶⁷ *Insurance Cos. v. Estes*, 106 Tenn. 472; *Kennedy v. Roundtree*, 59 S. C. 324; *Small v. Slocumb*, 112 Ga. 279; *Carpenter v. Snelling*, 97 Mass. 452; *Trowbridge v. Addoms*, 23 Colo. 518.

to prescribe rules of evidence for the state courts or to regulate the manner in which testimony shall be received by such courts.⁶⁸

§ 284. **Proof of deeds.**—Where the claimant rests his right of recovery upon a deed of the premises in question it will generally be sufficient to produce the deed, and where such deed shows a due compliance with statutory requirements no other or further proof of the instrument will, as a rule, be necessary to establish a *prima facie* title. If the deed appears to have been executed by all of the grantors, and further purports to have been acknowledged as provided by statute, then the officers certificate of such fact of acknowledgment, if substantially in form, dispenses with formal proof of signing and sealing,⁶⁹ while the mere possession of the instrument, in the absence of opposing circumstances, is sufficient evidence of delivery.⁷⁰ The delivery of a deed will always be presumed from slight circumstances where the intention to convey is manifest from the instrument itself,⁷¹ and, in the absence of opposing evidence, it will further be presumed to have been delivered at the time it was executed.⁷²

In the absence of a certificate of acknowledgment formal proof of execution must generally be furnished. For this purpose the subscribing witnesses should be produced,⁷³ if living, and even though a witness may have no independent recollection of the transaction, yet, if he recognizes his signature and pronounces it genuine, and entertains no doubt that he witnessed the execution, this, if uncontradicted, will usually be

⁶⁸ Latham v. Smith, 45 Ill. 31; Davis v. Richardson, 45 Miss. 499. But see *contra*, Chartier, etc. Co. v. McNamara, 72 Pa. St. 278.

⁶⁹ Samuels v. Borrowscale, 104 Mass. 207; Clark v. Troy, 20 Cal. 220.

⁷⁰ Roberts v. Swearingen, 8 Neb. 363; Chandler v. Temple, 4 Cush. (Mass.) 285; Brown v. State, 5 Colo. 496; Wallace v. Berdell, 97 N. Y. 13; Kern v. Howell, 180 Pa. St. 315.

⁷¹ Crabtree v. Crabtree, 159 Ill. 342, 42 N. E. Rep. 787; Delaplain v. Grubb, 44 W. Va. 612; Harman v. Oberdorfer, 33 Gratt. (Va.) 497.

⁷² Wheeler v. Single, 62 Wis. 380; Conley v. Finn, 171 Mass. 70; People v. Snyder, 41 N. Y. 397.

⁷³ Melcher v. Flanders, 40 N. H. 139; Brigham v. Palmer, 3 Allen (Mass.), 450.

sufficient.⁷⁴ If the subscribing witnesses are dead, or for other good cause cannot be produced, the execution of the instrument may be proved by the testimony of one who saw it executed,⁷⁵ or by other competent evidence,⁷⁶ and, generally, if there is any evidence, however slight, tending to prove a formal execution the deed should be permitted to go to the jury.⁷⁷

§ 285. Continued—Ancient deeds.—Where the instrument comes within the definition of an ancient deed, that is, when it is more than thirty years old, the rule requiring formal proof is dispensed with, where the instrument itself is free from suspicion and is shown to have come from proper custody.⁷⁸ In such event the deed is said to prove itself,⁷⁹ and it will not be necessary to call the subscribing witnesses even though they be living. It has further been held, that where a deed would be received in evidence as an ancient deed without proof of its execution, the power under which it purports to have been executed will be presumed.⁸⁰ But this has been denied in other cases which hold, that notwithstanding a deed is over thirty years old, yet if it purports to have been executed by one acting in an official capacity, it cannot be admitted as an ancient deed in the absence of proof of the authority of the officer to make it.⁸¹

In making proof of ancient deeds it must be shown that the instrument comes from such custody as to raise a reasonable

⁷⁴ *Bank v. Mitchell*, 15 Conn. 206.

⁷⁵ *Roane v. Baker*, 120 Ill. 309.

⁷⁶ *Foote v. Cobb*, 18 Ala. 585; *Dudley v. Sumner*, 4 Mass. 444; *Dunbar v. Marden*, 13 N. H. 311; *Munger v. Baldrige*, 41 Kan. 236.

⁷⁷ This is the rule laid down by Greenleaf and the elder writers generally, but in some states attestation has by statute been given a meaning wholly unknown to the common law. Consult local statutes.

⁷⁸ The possession and control of an ancient deed by the party claiming the land is a proper custody for the purpose of ad-

mitting such deed in evidence, where it does not appear that the contract was fraudulent or unlawful, although supplementary evidence of genuineness may be required. *Templeton v. Luckett*, 75 Fed. Rep. 254.

⁷⁹ *Whitman v. Henneberry*, 73 Ill. 109; *Gardner v. Grannis*, 57 Ga. 539; *Geer v. Mining Co.*, 134 Mo. 85; *Parker v. Chancellor*, 73 Tex. 495.

⁸⁰ *Johnson v. Shaw*, 41 Tex. 428; *Hughes v. McDivitt*, 102 Mo. 77.

⁸¹ So held in the case of a deed by one professing to act as an administrator. *Fell v. Young*, 63 Ill. 106. Compare *Hughes v. McDivitt*, 102 Mo. 77.

presumption of its genuineness, and such further circumstances must be shown as will establish the fact that the deed has been in existence the length of time indicated by its date.⁸² It has been held that indorsements or memoranda upon the deed may be considered as circumstances indicating that it is genuine, when they are of such a character as to satisfy a cautious and discriminating mind that they would not be there if the paper was a forgery, and if it can be shown that it has been on record for more than thirty years this is a strong circumstance in its favor.⁸³ Evidence of acts of possession also afford strong support to a deed of this character and go far to establish the genuineness of the instrument,⁸⁴ though it would seem that it is not necessary that possession under the deed should be proved.⁸⁵

Where a proper foundation has been laid for the introduction of an ancient deed, and the deed itself, on its face, purports to be more than thirty years old, the burden of proving that it is not an ancient deed is on the one so asserting.⁸⁶

In order that a copy from the record of an ancient deed may take the place of the original, when the latter is lost or destroyed, the registration must be shown to be ancient, just as the deed must appear to be ancient when it is itself offered in evidence.⁸⁷

§ 286. Continued—Grantor's possession.—Where title is claimed through a grant, all that is necessary to establish *prima facie* title is to produce and prove the deed together with proof of title in the grantor and of his previous possession of the land.⁸⁸ But where the claimant relies upon the deed of his immediate grantor and the possession of the latter, he must

⁸² Whitman v. Henneberry, 73 Ill. 109; Swicard v. Hooks, 85 Ga. 580; Williams v. Conger, 125 U. S. 397; Geer v. Missouri Lumber, etc. Co., 134 Mo. 85; Woods v. Montevallo, etc. Co., 84 Ala. 560.

⁸³ Whitman v. Henneberry, 73 Ill. 109; Geer v. Missouri Lumber, etc. Co., 134 Mo. 85.

⁸⁴ Bell v. McCawley, 29 Ga. 355; Crane v. Marshall, 16 Me. 27; Nixon v. Porter, 34 Miss.

697; Amons v. Dwyer, 78 Tex. 639.

⁸⁵ Woods v. Bonner, 89 Tenn. 411.

⁸⁶ Wisdom v. Reeves, 110 Ala. 418, 18 So. Rep. 13.

⁸⁷ Brown v. Simpson, 67 Tex. 225, 2 S. W. Rep. 644.

⁸⁸ Stowell v. Spencer, 190 Ill. 454; Harrell v. Bank, 183 Ill. 541; Crawford v. Corey, 99 Mich. 415.

show that such possession was at or near the time of the execution of the deed; it will not be sufficient to show such possession at some remote period.⁸⁹

It is contended that the same principle applies to ancient deeds, for, notwithstanding formal proof of execution may be dispensed with, it is yet necessary to connect the rights claimed under it with the facts of possession and claim of title. Hence, it has been held that ancient deeds cannot be shown as evidence against an adverse claimant in possession under a record title, to establish a right of entry on the part of the plaintiff, where no possession is shown to have been had prior to its execution, and no subsequent possession, under the same chain of title, after its execution.⁹⁰ The volume of authority, however, does not seem to favor this view and the more generally received rule is, that ancient deeds are admissible without first requiring the party offering them to show acts of possession over the lands embraced in them.⁹¹

§ 287. Continued—Technical defects—Acknowledgment. Objection may be interposed to the reception in evidence of a deed palpably defective in some matter of formal execution, as where it appears, upon inspection, to be insufficiently signed or sealed. So, also, if it is defectively acknowledged, as where the essential facts necessary to authentication do not appear from the officer's certificate, an objection will properly lie. While it is the policy of the law to uphold conveyances of lands and not to suffer them to be defeated by technical or unsubstantial objections,⁹² yet the proof offered must conform to the requirements of law,⁹³ and as nothing is presumed in favor of an official certificate, it follows that to be effective it must state all of the facts necessary to a valid official act.⁹⁴ Courts have no authority to presume that substantial requirements of

⁸⁹ *Florida S. R. Co. v. Burt*, 36 Fla. 497. And see *Crawford v. Corey*, 99 Mich. 415.

⁹⁰ *Davidson v. Morrison*, 86 Ky. 397, 5 S. W. Rep. 871.

⁹¹ *Holmes v. Coryell*, 58 Tex. 680; *Woods v. Bonner*, 89 Tenn. 411.

⁹² *Scharfenburg v. Bishop*, 35 Iowa, 60; *Wells v. Atkinson*, 24 Minn. 161; *Barnet v. Praskauer*, 62 Ala. 486.

⁹³ *Meskimen v. Day*, 35 Kan. 46; *Little v. Dodge*, 32 Ark. 453; *Clark v. Wilson*, 127 Ill. 449.

⁹⁴ *Hartshorn v. Dawson*, 79 Ill. 108.

the statute have been complied with any further than the certificate affirmatively shows, and if there appears to be a material omission, construction cannot aid it.⁹⁵ The party acknowledging must in all cases be sufficiently identified,⁹⁶ and the fact of acknowledgment must be explicitly stated.⁹⁷ If the grantor is a married woman and the statute has prescribed special formalities, these formalities become matters of substance and a certificate defective in this respect is void.⁹⁸

The acknowledgment must not only be made before some person authorized to take proof of deeds, but this fact must also be in some way apparent from the certificate,⁹⁹ or from some other paper annexed thereto.¹ If the instrument was acknowledged without the state, a certificate of magistracy is generally required by statute to accompany the certificate, except where the officer is a regularly appointed commissioner of deeds, in which event no proof of authority beyond the ordinary method of authentication is necessary.²

It must be remembered, however, that a certificate of acknowledgment is no part of the deed and that a defective acknowledgment does not invalidate it. Hence, a deed is still admissible in evidence on proper proof of execution, even though defectively acknowledged or certified.³

§ 288. Disabilities of coverture.—At the present time few questions can be raised with respect to the deeds of married women as the disabilities of the marriage relation have been generally removed in all of the states. But where the deed is ancient, it may give rise to serious questions concerning its validity and unless re-inforced by possession and limitation it may be inoperative for want of statutory requirements. At common law a married woman was utterly powerless to convey

⁹⁵ *Tully v. Davis*, 30 Ill. 103; *Hiss v. McCabe*, 45 Md. 77; *Bernhardt v. Brown*, 122 N. C. 587. *Ill.* 273; *Landers v. Bolton*, 26 Cal. 408.

⁹⁶ *Fryer v. Rockefeller*, 63 N. Y. 268; *Smith v. Garden*, 28 Wis. 685; *Gove v. Cather*, 23 Ill. 634. ⁹⁹ *Russ v. Wingate*, 30 Miss. 440; *Colby v. McOmber*, 71 Iowa, 469.

⁹⁷ *Bryan v. Ramirez*, 8 Cal. 461; *Short v. Conlee*, 28 Ill. 219; *Cabell v. Grubbs*, 48 Mo. 353. ¹ *De Segond v. Culver*, 10 Ohio, 188.

⁹⁸ *Silliman v. Cummins*, 13 Ohio, 116; *Mason v. Brock*, 12 ² *Smith v. Van Gilder*, 26 Ark. 527.

³ *Rullman v. Barr*, 54 Kan. 643.

her land by deed or other instrument and could accomplish this object only by levying a fine or suffering a common recovery. In this country at an early period provision was made whereby a married woman might convey her lands by joining with her husband in a deed therefor properly acknowledged and certified, but her acknowledgment was the operative act to pass title and not delivery of the deed, and unless there was a substantial compliance with the statute the deed was void. Subsequently the rigors of this rule became relaxed and a wife might, by joining with her husband in the execution of a deed, bind and conclude herself the same as though she were unmarried. Under these laws the acknowledgment ceased to be the effective means to work the transfer of title and the certificate thereof was placed on the same footing as that required for an unmarried woman. Finally, all disabilities arising out of coverture were abolished and a married woman was given the same contractual freedom as though she were sole, and at present she may convey her lands to the same extent and in the same manner as the husband may sell and convey property belonging to him. No joinder is necessary, other than for the purpose of waiving homestead or dower rights and for all practical purposes of transfer a married woman is not distinguished from one who is unmarried.

It will be seen, therefore, that the date of execution may be an important factor in determining the validity of a married woman's deed; that during certain periods it will be valid only when the husband has joined, and the certificate of acknowledgment shows a special method of authentication; that during certain other periods while the husband must still be joined the acknowledgment may be made as in other cases of transfer; that during still other periods a married woman's deed is not distinguished from that of her husband, requiring no joinder and no special method of acknowledgment. These various periods will be fixed by local statutory law, and hence no general rules can be framed concerning them. About all that can be said with certainty is, that under existing legislation in most states, both the common law and early statutory disabilities of coverture are completely abrogated; that the common law rights of the husband in the wife's property are abolished, and that as respects her separate property the husband and

wife stand before the law as strangers.⁴ In the few states where the old rules have been retained they are generally applied strictly and a non-compliance with statutory requirements will render a deed invalid.⁵

As a general rule, an objection based upon personal *status*, to be available as a defense, should be pleaded, and where a disability arising out of coverture is relied on, if the action is *ex contractu*, this rule will undoubtedly apply.⁶ But in ejectment there is scarcely any defense that may not be urged under the general issue and if the rule is permitted to have any application in that action it should not be extended further than to require a defendant to make his objection upon the trial.

§ 289. *Deeds of corporations.*—While the old rule, as stated by Blackstone, and other elementary writers, that a corporation can act only under its corporate seal, has long been abrogated so far as ordinary contracts are concerned, yet with respect to deeds the rule still holds good. And in making proof of a deed of a corporation it is generally essential to show that the seal affixed is, in fact, the common seal of the corporation and that it was affixed by proper authority.⁷ The attestation of the officer having custody of the seal,⁸ particularly where he acknowledges the act, would probably be sufficient if not contradicted.

It should further be remembered, that where a deed purports to be the act of a corporation the acknowledgment must also be a corporate act. In such event the deed must be acknowledged by the officers of the corporation as and for the corporation as well as for themselves, and a corporate deed is not proved by the mere acknowledgment by individuals, notwithstanding they may have been officers.⁹ Indeed, a deed by a corporation, with individual acknowledgment, has frequently been rejected by reason of the invalidity of the certificate of

⁴ Tomlinson v. Matthews, 98 Ill. 178.

⁵ As where the statute requires a privy examination and this is not done. McCaskill v. McKinnon, 121 N. C. 214. And see Belcher v. Weaver, 46 Tex. 293; Bayne v. Wiggins, 139 U. S. 210;

Hockman v. McClanahan, 87 Va. 33.

⁶ Work v. Cowhick, 81 Ill. 317.

⁷ Osborne v. Tunis, 25 N. J. L. 633.

⁸ Galloway v. Hamilton, 68 Wis. 651.

⁹ Bernhardt v. Brown, 122 N. C. 587.

acknowledgment.¹⁰ Local statutory policy may to some extent modify the doctrine last stated but a review of the methods employed in a majority of the states shows that the prevailing practice is as above indicated and that mere individual acknowledgments are not sufficient, even where the officer describes himself and the capacity in which he acts.

With respect to execution a corporate deed should be signed with the name of the corporation, the individual names of officers being added to show the act of procuration. It has been held, however, in a number of instances, that a deed purporting to bind a corporation, but signed only by the president or other executive officer, and not in the name of the corporation, may yet be regarded as the corporate act if the seal of the corporation is attached, and that in such case it will be presumed that the deed was executed by sufficient authority and that the seal annexed is the seal of the corporation.¹¹

In the case of private corporations it will not be necessary, as a rule, to show the authority of the officers to execute the deed, as the law presumes a precedent authorization in pursuance of which the deed was executed.¹² Where, however, the deed is the act of a public corporation, as a city or other municipality, the authority for its execution must generally be put in evidence.¹³

Usually, in actions on simple contracts, the existence and legality of a corporation are not required to be shown, unless these facts are put in issue by denials, but in ejectment where a party seeks to establish title by deraigning same through a corporation, the legal existence of such corporation becomes a material fact and must be shown in evidence where the opposing party claims title from another source.¹⁴

§ 290. **Construction of deeds.**—It will often happen in the trial of actions of ejectment, that the questions at issue can

¹⁰ See *Clark v. Hodge*, 116 N. C. 761.

¹¹ See *Sawyer v. Cox*, 63 Ill. 130; *Phillips v. Coffee*, 17 Ill. 154.

¹² *National Bank v. Bank*, 141 Ind. 352; *Merchants' Bank v. Citizens', etc. Co.*, 159 Mass. 505;

Gorder v. Pattsmouth Co., 36 Neb. 548; *Anderson v. South, etc. Co.*, 173 Ill. 213.

¹³ *Ward v. Lumber Co.*, 70 Wis. 445.

¹⁴ See *Sonoma Water Co. v. Lynch*, 50 Cal. 503; *Ward v. Lumber Co.*, 70 Wis. 445.

be determined only by a construction of the grants under which the parties claim, and an ascertainment thereby of the presumed intention of the grantors in the deeds given to evidence such grants. As a rule, when the words of a grant are clear and consistent, when they contain no ambiguity, and no fraud or mistake is alleged, the intention of the parties cannot be shown to override the obvious meaning thus disclosed. But if there is anything in the words of the grant which would indicate a probable different intent, the question, in the absence of mistake or fraud, is one for construction of the court;¹⁵ or if there be extraneous facts alleged which would, if established, bear upon the construction, the question may, under proper instructions, become one for the jury.¹⁶ The general rule in all cases is, that a deed will be so interpreted as to give effect to the intention of the parties when this can be accomplished without contravening some established rule of law or principle of public policy.¹⁷

Inconsistencies are always to be reconciled, if possible, and if reconciliation is impossible the earlier clauses will control the later ones.¹⁸ This rule, however, may be invoked only in extreme cases, for, generally, if it is the clear intent that two apparently inconsistent provisions shall both stand, then such limitations upon and interpretations of the literal significance of the language employed should be adopted as will serve to give effect, if possible, to all of the provisions.¹⁹ But if the intention is clearly and decisively shown by one clause, the intention thus disclosed will control, notwithstanding ambiguities and inconsistencies in other clauses.²⁰

¹⁵ *Rosenthal v. Ogden*, 50 Neb. 218. In this case it was held that it is the duty of the court to interpret a written contract if it is to be construed with reference to its terms alone but if the construction or application depends on extrinsic facts, the contract in connection with such facts should be submitted to the jury under proper instructions. And see *East Hampton v. Vail*, 151 N. Y. 463.

¹⁶ *Palmer v. Farrell*, 129 Pa.

St. 162, 15 Am. St. 708; *Harris v. Mott*, 97 N. C. 103; *Church v. Melville*, 17 Ore. 413; *East Hampton v. Vail*, 151 N. Y. 463.

¹⁷ *Farnam v. Thompson*, 171 Ill. 519; *Richter v. Richter*, 111 Ind. 456.

¹⁸ *Waterman v. Andrews*, 14 R. I. 589.

¹⁹ *Coleman v. Beach*, 97 N. Y. 545; *Waterman v. Andrews*, 14 R. I. 589.

²⁰ *Bent v. Rogers*, 137 Mass. 192.

In construing a deed the rights of the parties must be predicated upon the language therein employed, and the intention must be gathered from the words of the instrument,²¹ but the court may also read the instrument in the light afforded by surrounding circumstances,²² and for this purpose may always consider the situation of the parties and the state of the thing granted.²³

In all cases the construction of a grant must be favorable and as near the intention of the parties as the rules of law will admit.²⁴ Parol evidence may in some cases be resorted to, not to contradict or vary the words of the grant, but to explain it by showing the situation and condition of the subject-matter, and to aid in arriving at the meaning that the parties may have attached to the words used, especially in matters of description.²⁵ So, too, the subsequent acts of the parties in dealing with the land and their declarations in respect of it, may, in proper cases, be shown to give effect to the deed.²⁶ But, generally, where there is no ambiguity in a grant, then whatever the parties may have intended by its terms, or in what manner they subsequently may have treated it, are wholly immaterial circumstances and have no bearing upon the construction of the deed.²⁷

It is a further rule, that, while a deed is to be construed liberally and the intention of the parties is to be effectuated if possible, and that for this purpose all of the terms of a grant may be considered together, yet, whatever the intention may be, nothing will pass by the deed except what is described therein.²⁸

²¹ *Butterfield v. Sawyer*, 187 Ill. 598, 58 N. E. 602, 79 Am. St. 246; *Donahue v. McNulty*, 24 Cal. 411.

²² *Truett v. Adams*, 66 Cal. 218; *Louisville, etc. R. R. Co. v. Koelle*, 104 Ill. 455; *Gray v. Water-Power Co.*, 85 Me. 526.

²³ *Batavia Mfg. Co. v. Newton*, 91 Ill. 230; *Abbott v. Abbott*, 53 Me. 356; *Pollard v. Maddox*, 28 Ala. 325; *Prentice v. Storage Co.*, 58 Fed. Rep. 437; *Robinson v. Railroad Co.* 59 Vt. 426.

²⁴ *Lego v. Medley*, 79 Wis. 211;

Bassett v. Budlong, 77 Mich. 338; *Cravens v. White*, 73 Tex. 577.

²⁵ *Lyman v. Babcock*, 40 Wis. 512; *Willson v. Cochran*, 48 Pa. St. 107; *Shore v. Miller*, 80 Ga. 93; *Blow v. Vaughn*, 105 N. C. 198; *Hammond v. Johnston*, 93 Mo. 198.

²⁶ *Simpson v. Blaisdell*, 85 Me. 199.

²⁷ *Wilkins v. Young*, 144 Ind. 1.

²⁸ *Thaver v. Finton*, 108 N. Y. 394.

§ 291. Identification of parties—Presumptions as to grantees.—As a general proposition identity of name is *prima facie* evidence of identity of person, and is sufficient proof of the fact in the absence of all evidence to the contrary.²⁹ The presumption arising from identity of name is, of course, rebuttable, but it is sufficient to shift the burden of proof to the party denying it.³⁰ So, too, similarity of name is generally sufficient evidence of identity of person in a chain of title, in the absence of evidence casting a doubt upon the identity, where the execution of the deed is proved and the instrument is shown to have come from proper custody.³¹ But where any circumstance appears to cast a reasonable doubt upon the identity of persons, upon whose identity the title depends, a mere similarity of names will not suffice to establish a presumption of identity.³²

In cases of doubt, parol evidence is always admissible to explain the description given in a deed so as to ascertain the particular person or persons intended to be embraced in that de-

²⁹ *Wilson v. Holt*, 83 Ala. 528; *Douglas v. Dakin*, 46 Cal. 49. But see *Sitler v. Gehr*, 105 Pa. 577.

³⁰ *Williams' Estate*, 128 Cal. 552, 61 Pac. Rep. 670, 79 Am. St. 67. Explanatory descriptions may also serve to raise the presumption. Thus, a woman to whom a devise is made as "Sarah V. Laughlin," who subsequently reconveys the premises as "S. V. Butler," describing herself in the deed as formerly "Sarah V. Laughlin," will be presumed to have acquired her new name by marriage, and no further proof of identity is required. *Dowdy v. McArthur*, 94 Ga. 577, 21 S. E. Rep. 148.

³¹ *Smith v. Gillum*, 80 Tex. 127, 15 S. W. Rep. 794.

³² Thus, it has been held that where the name of the grantee in a deed and that of the grantor in a subsequent deed of the same land are the same, except as to the initial letter of

the middle name, it will not be presumed that they were the same persons. *Ambs v. Railway Co.*, 44 Minn. 266. On the other hand, it has been held that the omission of the middle initial from the name of the grantor in a deed is not sufficient to preclude it from admission in evidence, on the ground that such grantor is not identified as the grantee in a former deed which contained such initial, when the residence stated in both deeds is the same. *Clow v. Plummer*, 85 Mich. 550. So, too, a description of the person may cure a defect of this kind, as where the grantor of a deed is described as the heir of one deceased, then, notwithstanding the insertion of a middle initial in the name signed to the deed, the identity of the grantor with the heir is *prima facie* established. *Blomberg v. Montgomery*, 69 Minn. 149.

scription,³³ and it seems the evidence need not be of the same high character and tendency as that which would authorize the correction of a mistake.³⁴ So, too, it is always competent to show that different names may, in fact, identify or relate to the same person.³⁵

A question will sometimes arise with respect to identity of persons where two or more individuals bearing the same name claim title or have assumed the right to make conveyances. These questions, as a rule, must be determined by affirmative proof, but, in some instances, the law will raise presumptions which will be of controlling efficacy in the absence of proof to the contrary. Thus, where a father and son have the same name, and a conveyance of land is made to a grantee bearing such name, without designating whether to the father or the son, the law will presume that the father was intended for the grantee.³⁶ In a case of this kind it devolves upon the son, or the party claiming under him, to introduce evidence sufficient to overcome or rebut the presumption. Should this be done, however, the burden of proof will be shifted to the person claiming under the father, and he will then be bound to produce evidence sufficient to overcome, or at least equal in probative force, the case of the adverse party.³⁷

It does not seem that the foregoing rule is sustained by any very cogent reasoning. Where the father is an adult and the son an infant we may discover some show of authority for the presumption, but where both are equally competent it can be regarded only as an arbitrary rule raised from the necessities of the case. It is probably borrowed from the customs and usages of the civilians, as the common law is generally strenuous in its insistence that all questions of fact shall be determined by proof.

³³ *Salmer v. Lathrop*, 10 S. Dak. 216; *Andrews v. Dyer*, 81 Me. 104.

³⁴ *Houston v. Bryan*, 78 Ga. 181.

³⁵ *Rudicel v. State*, 111 Ind. 595.

³⁶ *Graves v. Colwell*, 90 Ill. 612; *Kincaid v. Howe*, 10 Mass.

203; *Padgett v. Lawrence*, 10 Paige (N. Y.), 170.

³⁷ *Graves v. Colwell*, 90 Ill. 612. The reader is referred to the learned opinion in this case, by Baker, J., for an able exposition of the probative value of presumptions of law and the evi-

§ 292. **Description of the premises.**—Where the claimant of title relies upon a deed of conveyance it is well settled, both by reason and authority, that in order to be effective as an evidence of title, it must, either in terms or by reference or other designation, give such a description of the subject-matter intended to be conveyed as will be sufficient to identify the same with reasonable certainty;³⁸ failing in this the deed will be inoperative.³⁹

It is a further rule, however, that deeds and conveyances of land must be upheld if possible; that the terms and phraseology of description should be interpreted with a view to that end whenever this can reasonably be done,⁴⁰ and that that will be considered certain which may be made certain.⁴¹ Hence, notwithstanding the terms of the description may not, of themselves, clearly indicate the dimensions of the land, yet, if they sufficiently point to a particular tract, which is so described that it may be identified by parol, if the claimant by proper evidence can upon the trial definitely locate it, this would seem to be sufficient.⁴² Nor is a deed void because it fails to specifically describe any land, provided it is certain. Thus, a general description only, if certain in its terms, will be given operation when aided by extrinsic evidence.⁴³ This is well illustrated in the case of a deed of all the lands belonging to the grantor, wherever the same may be situated. Such a deed is not void for want of description but will operate to transfer the title to any and all lands which the grantor may own or in which he may have an interest.⁴⁴ So, too, a description not sufficiently

dence necessary to overcome them.

³⁸ Long v. Wagoner, 47 Mo. 178.

³⁹ Coleman v. Improvement Co., 94 N. Y. 229; Deaver v. Jones, 114 N. C. 649; Harris v. Shafer, 86 Tex. 314; White v. Stanton, 111 Ind. 540.

⁴⁰ Edwards v. Bowden, 99 N. C. 80; Grandy v. Casey, 93 Mo. 595; Case v. Dexter, 106 N. Y. 548; Campbell v. Carruth, 32 Fla. 264.

⁴¹ Nixon v. Porter, 34 Miss. 697; Dwight v. Packard, 46 Mich. 614; Smith v. Crawford, 81 Ill. 296; Bitner v. Land Co., 67 Tex. 341.

⁴² Edwards v. Bowden, 99 N. C. 80; Smith v. Crawford, 81 Ill. 296; Church v. Church, 60 Fed. Rep. 937; Peart v. Brice, 152 Pa. 277.

⁴³ Gress Lumber Co. v. Coody, 94 Ga. 519; Griffin v. Hall, 115 Ala. 482.

⁴⁴ McCulloh v. Price, 14 Mont. 320; Pettigrew v. Dobbelaar, 63

certain in itself may be made so by reference to other deeds in which it is sufficient.⁴⁵ In case a general description only is followed by a clause summing up the intention of the parties as to the premises conveyed, it will have a controlling effect upon all the prior phrases used in the description.⁴⁶

A difficulty will sometimes be experienced in case of double descriptions inconsistent in their terms. But where there is a doubt as to the construction of a deed the general rule is, that it shall be taken most favorably for the grantee.⁴⁷ Acting upon this rule it has been held that if there are two descriptions of the land intended to be conveyed, and they do not coincide, the grantee is at liberty to select that which is most favorable to him.⁴⁸ In any event, if the descriptions are inconsistent, and the deed will operate as to one of them, the other may be rejected as surplusage.⁴⁹

Where a description, correct as far as it goes, is not complete, it may generally be completed by parol evidence, provided a new description is not introduced. This will frequently be the case where land is described in general terms by some particular name or designation, and, in such cases, it has frequently been held that parol evidence is admissible to show that in the community where the land is situate it was known by the description employed in the deed.⁵⁰

§ 293. **Identification of land after conveyance.**—Notwithstanding a deed, in itself, may be inoperative for want of a

Cal. 396; *Coleman v. Improvement Co.*, 94 N. Y. 229.

⁴⁵ *Rupert v. Penner*, 35 Neb. 587; *Hoffman v. Port Huron*, 102 Mich. 417; *Russell v. Brown*, 41 Ill. 184; *Credle v. Hays*, 88 N. C. 321; *Koenigheim v. Miles*, 67 Tex. 113.

⁴⁶ *Ousby v. Jones*, 73 N. Y. 621; *Barney v. Miller*, 18 Iowa, 460; *Bates v. Foster*, 59 Me. 157. As where lands are conveyed generally, that is, with no specific descriptions, and such lands are further described as all the lands to which the grantors are entitled as heirs at law of a par-

ticular person. See *Plummer v. Gould*, 92 Mich. 1.

⁴⁷ *Cottingham v. Parr*, 93 Ill. 233.

⁴⁸ *Sharp v. Thompson*, 100 Ill. 447.

⁴⁹ *Bray v. Adams*, 114 Mo. 486.

⁵⁰ *Hammond v. Johnston*, 93 Mo. 198. Thus, where land was described as "Fish Lake Lot," held, that if there is any doubt of the intention of the parties, evidence of what was known by common reputation as "Fish Lake Lot" may be received. *Case v. Dexter*, 106 N. Y. 548.

sufficient description of the land intended to be conveyed, it may yet be given effect by reason of the subsequent acts or declarations of the parties, and the construction put upon the words of description by them may be resorted to for the purpose of identification. Thus, where a tract of land intended to be conveyed is not sufficiently ascertained or identified by the deed, the parties may afterward survey and mark out the shape and dimensions, and if this is done and the grantee then takes possession this will ascertain the grant and give effect to the deed.⁵¹ So, too, if land is conveyed by a definite general location but with unascertained boundaries, the declarations and admissions of the grantor subsequently made as to the boundaries of the land so conveyed are admissible in evidence against him or any one claiming title under him.⁵² As a further general rule, courts should not give a construction to a deed in direct conflict with that which the parties have themselves put upon it.⁵³ But these principles are applicable only where the grant is uncertain or ambiguous, for, if there is no uncertainty or ambiguity with respect to the land conveyed, the manner in which the parties may have subsequently treated it has no bearing whatever on the construction of the deed.⁵⁴

§ 294. **Limitation of the estate.**—In the action of ejectment the specific interest of the claimant in the land sought to be recovered is always an important fact, and this fact is generally required to be found by the jury in making up their verdict. Usually the pleader is required to declare the quantity and quality of the estate claimed, although in some states this may be shown on the trial under the general allegation of ownership. But little difficulty is now experienced with respect to the estate intended to be conveyed, particularly where the interest claimed is a fee, and much of the old learning of this subject is practically obsolete. Formerly much technical nicety was required in framing grants of an estate and unless appropriate words of limitation were inserted, the grant, in many in-

⁵¹ *Simpson v. Blaisdell*, 85 Me. 199; *Armstrong v. Mudd*, 10 B. Mon. (Ky.) 144. And see *Wilson v. Carrico*, 140 Ind. 533.

⁵² *Simpson v. Blaisdell*, 85 Me. 199.

⁵³ *Mansfield v. Place*, 93 Mich. 450.

⁵⁴ *Wilkins v. Young*, 144 Ind. 1.

stances, would be ineffective to convey the interest intended. Special words of limitation were always necessary to create or convey a fee, and the early cases abound in many fine-spun distinctions and much subtle reasoning. But, for many years a familiar provision of the statute, in most of the states, has abrogated the old doctrines by declaring that every grant of lands will pass all the estate or interest of the grantor, unless a different interest shall appear by express terms or necessary implication.⁵⁵

Where the foregoing rule prevails technical words of limitation are not required to create or transfer a fee. If any lesser estate is intended apt words for such purpose should be employed, for unless a contrary intent can reasonably be inferred from the terms employed the deed must be held to convey all of the interest of the grantor, whatever it may be.

§ 295. **Repugnant clauses and recitals.**—At law, no less than in equity, courts are frequently called upon to construe deeds and declare the rights of parties thereunder and the action of ejectment will furnish many opportunities of this kind. The general rule undoubtedly is, that in a deed which purports to evidence an absolute grant, any portion thereof which restricts the absolute conveyance of the fee, whether it be called a condition, reservation, or exception, being repugnant to the grant is null and void. But, while the general integrity of this rule is unassailable, the rule itself is not without qualification, and in the cases which support the rule the repugnancy has generally been of such a character that the intention of the parties could not be ascertained from the whole instrument, or if ascertained could not be carried into effect consistently with established legal principles. The controlling motive in every contract is the intention of the parties. Whenever this intention clearly appears upon the face of a deed effect should be given to it, however unusual the form of the instrument,⁵⁶ and a reservation should never be regarded as repugnant, where

⁵⁵ See *Hawkins v. Chapman*, 577, 15 Am. St. 803; *Bassett v. 36 Md. 83*; *Lehndorf v. Cope*, 122 Ill. 317; *Eiseley v. Spooner*, 23 Neb. 470.

⁵⁶ *Cravens v. White*, 73 Tex. 577, 15 Am. St. 803; *Bassett v. Budlong*, 77 Mich. 338, 18 Am. St. 404; *Williams v. Bently*, 27 Pa. St. 294; *Cooney v. Hayes*, 40 Vt. 478.

the grantee, if it is permitted to be effectual, may yet acquire a valuable interest in the thing granted.⁵⁷ In all cases the rules of construction are imperative that all of the language of a grant must be considered and effect given to it, unless it is so repugnant and meaningless that this cannot be done;⁵⁸ and, when this condition is manifest, the repugnant or senseless portion may, in proper cases, be rejected as surplusage,⁵⁹ while in some instances words may be supplied by intendment.⁶⁰

It will sometimes happen that a deed discloses two conflicting intentions, one as clearly expressed and emphatic as the other. Thus, the granting clause may express an intention to convey the entire interest in the land, while the *habendum* may express an intention to convey only an undivided half of such interest. The ancient rule is, that where two clauses of a deed contradict each other the first shall stand as the expression of the grantor's intention,⁶¹ and where the *habendum* is repugnant to the premises it is void. This proceeds on the principle that all deeds shall be construed most strongly against the grantor, and therefore, that he shall not be allowed to contradict or retract, by subsequent words, the grant made in the premises. Thus, if lands are given in the premises to one and his heirs, and in the *habendum* to him for life, the latter would be void, because utterly repugnant to and irreconcilable with the premises. This rule is generally recognized and applied in cases of conflicting intention, but, as it is purely arbitrary, is never resorted to unless it shall become absolutely necessary. If, from the whole instrument, the true intention can be gathered, that intention should prevail,⁶² but where conflicting intentions are plainly and unequivocally expressed, there is no alternative but to construe it by the rule first stated, even though it may be arbitrary.⁶³

⁵⁷ Gay v. Walker, 36 Me. 54.

⁵⁸ Richter v. Richter, 111 Ind. 456; Lehndorf v. Cope, 122 Ill. 317; Robinson v. Railway Co., 59 Vt. 426; Case v. Dexter, 106 N. Y. 548.

⁵⁹ Cooper v. Cooper, 76 Ill. 57; Coles v. Yorks, 36 Minn. 388; Birch v. Hutchings, 144 Mass. 561.

⁶⁰ Case v. Dexter, 106 N. Y. 548.

⁶¹ The old maxim is, "The first deed and the last will shall operate."

⁶² Coles v. Yorks, 36 Minn. 388; Grandy v. Casey, 93 Mo. 595.

⁶³ Pyncheon v. Stearns, 11 Met. (Mass.) 316; Green Bay, etc. Co. v. Hewitt, 55 Wis. 96.

§ 296. **Continued—Granting clause and habendum.**—It will frequently happen that the granting clause and the *habendum* of a deed are inconsistent. When the inconsistency amounts to a clear repugnance between the nature of the estate granted and that limited in the *habendum*, the general rule is that the latter must yield to the former, which controls the effect of the deed.⁶⁴ But this rule, it is said, applies only when, from a survey of the whole instrument, and the attendant circumstances, it cannot be determined with reasonable certainty that the grantor intended that the *habendum* should control.⁶⁵ On the other hand, notwithstanding the repugnancy, if it shall satisfactorily appear that the grantor intended that it should enlarge or diminish the estate previously granted, it may be considered as an addition to the granting clause which must govern the construction of the same, even though such construction may practically destroy its effect.⁶⁶

The statute has eliminated many of the perplexing questions of this kind by providing a form of deed in which the *habendum* is wholly omitted. Where these statutory forms are used, of course, none of the questions we are now considering can arise, but there are many forms of conveyance for which the prescriptions of the statute do not seem adequate, as where the grant is burdened with conditions, or where it is desired to limit one estate upon another, and in such cases, as well as in ancient deeds, resort must sometimes be had to the rules of construction relative to inconsistent provisions.

§ 297. **Signing by one not described as a grantor.**—There is some conflict of opinion with respect to the legal effect of a deed signed by persons who are not described therein as grantors. The volume of authority, however, seems to sustain the proposition that in order to convey by grant the person possessing such right must be described in the deed as grantor and must use apt and proper words to transfer his interest to the grantee.⁶⁷ Hence, notwithstanding a person may sign, seal

⁶⁴ Ratliffe v. Marrs, 87 Ky. 26;
Berry v. Billings, 44 Me. 416;
Rines v. Mansfield, 96 Mo. 394;
Riggin v. Love, 72 Ill. 553.

⁶⁵ Bodine's Adm'rs v. Arthur,
91 Ky. 53, 34 Am. St. 162.

⁶⁶ Henderson v. Mack, 82 Ky.
379; Fogarty v. Stack, 86 Tenn.
610.

⁶⁷ Agricultural Bank v. Rice,

and deliver an instrument intended to be an operative deed of conveyance, yet, if his name appears in no other part thereof, his interest in the premises will not pass by such instrument.⁶⁸ In cases where one not otherwise mentioned has signed with others who are described as parties the rule has many times been announced that merely signing, sealing and even acknowledging an instrument in which another person is grantor is not sufficient.⁶⁹

In a few instances a contrary rule has been stated.⁷⁰ In these cases it is contended that the signing of a deed manifests the intention of the signers to be bound by it, and that courts should so construe the instrument as to give effect to such intention. To this it is replied that the intention of the parties to a written agreement must be derived from the language of the contract, and not from inference; that where there is nothing in a deed to show a purpose on the part of one of the signers to make a conveyance his mere signature does not manifest such purpose and, therefore, as to him the deed is wholly inoperative.⁷¹

Where a deed operates only as an estoppel and not as a conveyance, signing, sealing and acknowledging may be sufficient for the purposes of the estoppel, as where either husband or wife unite in the execution of a deed conveying the separate property of one of the spouses. This has been held sufficient as an assent and joining under statutes providing for conveyances by married women, or relinquishment of dower by wives, by the joint deed of the spouses.⁷²

§ 298. *Forged deeds.*—Any document relied upon as a muniment of title must, as a rule, be susceptible of being proved, unless it ante-dates the period of limitation, in which

4 How. (U. S.) 225. This is one of the early leading cases on this point. The opinion is by Taney, C. J.

⁶⁸ Peabody v. Hewett, 52 Me. 33.

⁶⁹ See Catlin v. Ware, 9 Mass. 218; Purcell v. Goshorn, 17 Ohio, 105; Harrison v. Simons, 55 Ala. 510; Stone v. Sledge, 87 Tex. 49.

⁷⁰ Armstrong v. Stovall, 26 Miss. 275; Elliot v. Sleeper, 2 N. H. 525.

⁷¹ Stone v. Sledge, 87 Tex. 49.

⁷² Peter v. Byrne, 175 Mo. 233, 75 S. W. Rep. 433, 97 Am. St. 576; Pease v. Ridge, 49 Conn. 58; Miller v. Shaw, 103 Ill. 277; Chapman v. Miller, 128 Mass. 269; Merrill v. Nelson, 18 Minn. 374.

case, in the absence of other controlling circumstances, it may be offered under the rules relating to ancient deeds. As a general proposition, a forged deed, having never had a legal inception, is absolutely void;⁷³ it conveys no right, title or interest, nor will the recording of same affect the legal rights of the parties concerned.⁷⁴ Where the fact of forgery is established the question of good faith is not usually involved,⁷⁵ and it is immaterial that a purchaser may have entered thereunder without notice of the infirmity.

The operation of a deed of this character may, however, be affected by the statute of limitations and where there has been an actual adverse possession, commenced without notice and in good faith, and such possession has continued uninterruptedly for the entire statutory period, such deed may be effective as an estoppel considered in connection with the statute of limitations.⁷⁶ But where the parties are all living, scarcely any length of time short of the full period of limitation will prevent an action to recover land from an innocent purchaser or estop the claimant to deny the execution of the deed.⁷⁷

Where the execution of a deed, alleged to have been forged, forms the main issue in an action of ejectment brought to dispossess one holding thereunder, and the grantor therein is dead, the jury have a right, in the determination of the question, to take into consideration the subsequent conduct of such grantor, and whether, after the date of the deed, he ever set up any claim to the land or made any demand for possession of the parties in actual occupancy; whether he paid the taxes, or did any act indicative of ownership or in assertion of proprietary rights.⁷⁸ In like manner the acts and conduct of an alleged grantor still living may in proper cases be shown to rebut the charge of forgery, particularly where the rights of third persons have intervened. In such event the doctrine of estoppel might be invoked, but this, in most instances, would be a diffi-

⁷³ *Haight v. Vallet*, 89 Cal. 245; *Meley v. Collins*, 41 Cal. 663; *McGinn v. Tobey*, 62 Mich. 252.

⁷⁴ *Haight v. Vallet*, 89 Cal. 245.

⁷⁵ *McGinn v. Tobey*, 62 Mich. 252.

⁷⁶ *Parker v. Railroad Co.*, 31 Ga. 387.

⁷⁷ *Meley v. Collins*, 41 Cal. 663.

⁷⁸ *Haight v. Vallet*, 89 Cal. 245.

cult undertaking, even in those states where an estoppel *in pais* may be employed in a legal action. To conclude a party by an equitable estoppel there must either be a fraudulent purpose of the party against whom it is applied, or his acts must produce a fraudulent result.⁷⁹ Hence, evidence of the acts and conduct of the grantor before he had knowledge of the forged deed would not be admissible. Such evidence would have no bearing on the question of the genuineness of the instrument nor could it be used to contradict his testimony that the deed was not his.⁸⁰ And even though he may have had knowledge of the forgery his mere delay in attacking the forged deed would not be material, if it did not extend over a period that would call into operation the statute of limitations.⁸¹ A still stronger case is presented where the grantor is in possession and an effort is made to evict him in ejectment. While it would be his duty to correctly inform all persons who might apply to him for information respecting the title, and in the event of his failure so to do might be estopped to plead the truth as against those whom he had deluded, yet the law does not require a landowner to take positive steps to counteract a forgery by which an attempt is being made to rob him of his property, nor does it require him, within any particular period, to commence proceedings to vindicate his title against the fraudulent claim of the forger or one claiming under him. He may bide his time and trust to the strength of his title when assailed.⁸²

An instrument, though properly and legally executed, may acquire the character of a forged deed by changes and alterations made subsequent to delivery. In such cases, if it is intended to contest the deed, the statute frequently requires the filing of an affidavit of forgery by the contestant, and, usually, in the absence of such affidavit the law will presume that a duly registered deed was executed as offered in evidence, and if alterations appear to have been made therein, that they were made at or before the time of its execution.⁸³

⁷⁹ Flower v. Elwood, 66 Ill. 447.

⁸⁰ Baird v. Jackson, 98 Ill. 78.

⁸¹ Meloy v. Collins, 41 Cal. 663.

⁸² Chandler v. White, 84 Ill. 435.

⁸³ Collins v. Boring, 96 Ga. 360, 23 S. E. Rep. 401.

§ 299. **Fraudulent conveyance.**—As a general rule, a deed fair and regular upon its face and purporting to have been given for a valuable consideration, is not subject to impeachment or collateral attack in an action at law. In some states, however, it would seem that this rule has been denied from a comparatively early period and courts of law have been permitted to pass upon the question of fraudulent intent even when incidentally presented. In these states it has been held that in the trial of actions of ejectment, where the question arises whether a deed relied upon by either party as a part of the chain of title was executed for the purpose of hindering, delaying or defrauding creditors, evidence may be heard to attack or sustain the conveyance, notwithstanding the action was not brought to directly impeach its character.⁸⁴ Where codes of procedure have been adopted there has been a tendency to retain this principle, particularly in states where it was allowed to obtain under the old practice, and recent decisions in such states announce the doctrine that in statutory actions for the recovery of land, as in the old action of ejectment, any deed offered as a link in a chain of title is thereby exposed to attack for fraud in its inception,⁸⁵ and the same proof that would invalidate same in a direct proceeding in equity may be shown.⁸⁶

Where the rule we are now considering prevails a creditor may place his demand in judgment, levy execution upon the property alleged to have been fraudulently transferred and cause the same to be sold in satisfaction of the judgment. The purchaser at sheriff's sale may then contest the validity of the fraudulent grantee's title in an action of ejectment. It is well settled, however, that transfers made for the purpose of hindering or delaying creditors are not absolutely void, even though the statute may so pronounce them. At most, they are voidable only, and until impeached by a proper proceeding the title,

⁸⁴ See *Flannagan*, 7 Ired. (N. C.) 471.

⁸⁵ *Jones v. Cohen*, 82 N. C. 75; *Helms v. Green*, 105 N. C. 251, 18 Am. St. 893; *Fulton v. Hanlon*, 20 Cal. 450; *Stuart v. Mays*, 54 Ga. 554; *Comings v. Leely*, 114 Mo. 454.

⁸⁶ *Helms v. Green*, 105 N. C. 251, 18 Am. St. 893; *Potter v. Adams*, 125 Mo. 118, 46 Am. St. 478; *Stebbins v. Kay*, 123 N. Y. 31; *Cheney v. Crandell*, 28 Colo. 383.

with all its incidents, vests in the grantee. It follows therefore, that a plaintiff, in such a case, cannot be permitted to recover possession without first obtaining a judicial determination that the transfer was in fact fraudulent and the resulting deed void. But these questions, it seems, may be presented and determined in the ejectment suit, and the plaintiff, by proving the fraudulent character of the conveyance may defeat it. Where this is done the fraudulent deed becomes void from the beginning and the sheriff's deed is held to convey the legal title.⁸⁷

§ 300. **Land held in adverse possession.**—It was long the policy of the law to deny effect to all sales and conveyances of land of which any other person, at the time of such sale, contract or conveyance, had an adverse seizin and possession, and deeds made in pursuance of such sales were held to be null and void.⁸⁸ This was not only the recognized doctrine of the common law but the statutory rule of many states and such rule may still be found upon the books of some of the older jurisdictions.⁸⁹ When such rule obtains a conveyance of this char-

⁸⁷ *Chandler v. Bailey*, 89 Mo. 643; *Campbell v. Jones*, 25 Minn. 155; *Thomason v. Neeley*, 50 Miss. 310; *Bank v. Risley*, 19 N. Y. 369. The judgment creditor has the election of two remedies against a fraudulent conveyance; that is, he may bring his action to set aside the conveyance, or he may levy upon the land and sell it for the payment of his debt. *Lynn v. Le Gierse*, 48 Tex. 140; *Bobb v. Woodward*, 50 Mo. 102. In the event he takes the latter course, the purchaser at such execution sale gets the title, because at the time of the levy it remained in the fraudulent debtor, the defendant in the execution, and was subject to sale. *Bump*, *Fraud. Con.* § 471; *Scott v. Scott*, 85 Ky. 385, 5 S. W. Rep. 423. In the case last cited the court said: "As against the fraudulent

transferee, however, the creditor may seize the property as that of the fraudulent debtor; and the title that may be thus acquired is not a mere equity or right to control the legal title, and have the fraudulent sale vacated by an appropriate proceeding, but it is the legal title itself, against which the fraudulent transfer is no transfer at all. The legal title remains in the debtor, as to his creditor, notwithstanding the fraudulent transfer, and the possession of the fraudulent transferee may properly be regarded as that of the debtor." And see further, *Willard v. Masterson*, 160 Ill. 443, 43 N. E. Rep. 771; *Smith v. Ried*, 134 N. Y. 568, 31 N. E. Rep. 1082; *Lynn v. Le Gierse*, 48 Tex. 138.

⁸⁸ See 3 Wash. Real Prop. 329 (4th ed.); 4 Kent, Com. 446.

⁸⁹ See *Nelson v. Brush*, 22 Fla.

acter is not considered as passing a title, but as the mere transfer of a right of action, and, being in violation of the early laws against the champerty and maintenance, as well as of statutory policy, will not be sustained by the courts.⁹⁰

The English statutes, upon which this doctrine is founded, grew out of peculiar exigencies entirely foreign to our condition and habits. They were passed at the close of revolutions, when, the property of the kingdom having to a great extent changed hands, it became the interest of those who succeeded to power to place every obstacle in the way of the former proprietors recovering possession. The principal statute upon this subject, and the one which formerly influenced both legislation and the decisions of American courts, is that of 32 Henry VIII., against selling pretended titles, and a pretended title, within the purview of the common law, is where one person lays claim to land of which another is in possession holding adversely to the claim. It was early conceded that the ancient policy which prohibited the sale of pretended titles and held the conveyance to a third person of lands held adversely at the time to be an act of maintenance, was founded upon a state of society which does not exist in the United States, yet the doctrine prevailed very generally in all parts of the country until comparatively recent years, and, as before shown, was incorporated in the statutory law of many states.

It has been held that a champertous deed, being void, confers no right of entry,⁹¹ but the tendency, even where the rule continues to receive a recognition, is to relax the strictness of the ancient doctrine and it has been held that an entry upon the land, and a delivery there, will evade the letter of the law and give the deed validity.⁹² At most, the principle will apply only as to the person holding the adverse title at the time of the ex-

374; *Ellwood v. Northrop*, 106 N. Y. 172.

⁹⁰ See *Sohler v. Coffin*, 101 Mass. 179; *Jones v. Monroe*, 32 Ga. 188; *Graves v. Leathers*, 17 B. Mon. (Ky.) 667; *Bowling v. Roark*, 15 Ky. L. Rep. 499, 24 S. W. Rep. 4; *Levy v. Cox*, 22 Fla. 546.

⁹¹ *Bowling v. Roark*, 15 Ky. L. Rep. 499, 24 S. W. Rep. 4; *Reyes v. Middleton*, 36 Fla. 99, 29 L. R. A. 66.

⁹² *Farwell v. Rogers*, 99 Mass. 36; *Warner v. Bull*, 13 Met. (Mass.) 4.

ecution and delivery of the deed,⁹³ or those who claim by, through, or under him. To such persons the deed may be void, or, at least, voidable, but as to all others it would be valid and effectual.⁹⁴

But the foregoing doctrine now finds but a small adherence in this country. In many of the states where it formerly obtained it has been swept away by express statutory enactments, and in the newer states of the West it never has been accorded a recognition. In such states no conveyance is void because at the time of the execution and delivery of a deed the land in question is in the possession of another who holds by a title adverse to that of the grantor,⁹⁵ and, generally, under the statutes now in force, any one claiming title to land, although out of possession, and notwithstanding there may be an actual adverse possession, may sell and convey such land the same as though in the actual possession thereof, and his deed will give the grantee the same right of recovery in ejectment as if the grantor had been in the actual possession when he conveyed.⁹⁶

§ 301. **Claimant under deed of bargain and sale.**—Notwithstanding that the operative forms of conveyance have been very much simplified of recent years and that much of the medieval refinement and subtlety of conveyancing has been abolished as unsuited to our conditions and system of land titles, yet there have still been preserved distinctions which savor of that subtlety and which call for at least passing notice in a work of this kind. The rights of a claimant are made to depend, in some measure, on the phrasing of his deed, and the operative words of grant are frequently decisive of the question of title.

⁹³ *Nelson v. Brush*, 32 Fla. 374; *Ellwood v. Northrop*, 106 N. Y. 172.

⁹⁴ *Edwards v. Rays*, 18 Vt. 473; *Wade v. Lindsey*, 6 Met. (Mass.) 407; *Betsey v. Torrence*, 34 Miss. 138; *Farnum v. Peterson*, 111 Mass. 151. A deed of a tract of land by one in possession of only a part of it, at a time when third persons were in possession of the greater portion claiming under a superior title, is not absolutely void

under the champerty statute, but only voidable at the instance of the parties in adverse possession. *Fort Jefferson Impt. Co. v. Dupoyster*, 21 Ky. L. Rep. 515, 48 L. R. A. 537.

⁹⁵ *Hall v. Ashby*, 9 Ohio, 96; *Shortall v. Hinkley*, 31 Ill. 219; *Crane v. Reeder*, 21 Mich. 82; *Stewart v. McSweeney*, 14 Wis. 471.

⁹⁶ *Chicago v. Vulcan Iron Works*, 93 Ill. 222.

The instrument of conveyance now commonly employed is a modification of the old deed of bargain and sale under the statute of uses. As this deed generally contains personal covenants of the grantor it has come to be known as a "warranty deed." There is also in common use a form of conveyance, derived from the ancient common-law release, known as a "quitclaim deed." Both of these deeds are now regarded as substantive forms of conveyance, and both are adapted to transfer the title to land with all of its incidents, but the rights of the parties thereunder are, in most of the states, dissimilar in many respects. In this and the succeeding paragraph these points of difference will briefly be considered.

The legal import of a deed of bargain and sale, whether with or without express covenants, is that of an absolute conveyance with no resulting trust or reversionary rights in the grantor, and when made by a person of full legal capacity, who is under no disability, it precludes the grantor and all claiming under him from any and every right, claim or demand in the granted lands. In practice but few questions can arise with respect to the effect of deeds of this kind, and even where the grantor is without title at the time the deed is delivered, the statute, in many states, saves the rights of the grantee in the event of an after acquired title by the grantor, and this quite independent of the fact that the deed may be without express personal covenants.⁹⁷ The character of the deed is generally fixed by the operative words of conveyance and where the common-law formula "grant, bargain and sell," or its statutory equivalent, is employed, an estoppel is raised, that, for most purposes, is as effectual as though created by express personal covenants.⁹⁸

§ 302. **Claimant under quitclaim deed.**—There is much diversity of opinion in this country with respect to the operation and effect of that form of conveyance popularly known as "quitclaim," as well as regarding the extent and character of the rights that may be asserted by a grantee in a deed of this

⁹⁷ *Holbrook v. Debo*, 99 Ill. 372.

⁹⁸ By the ancient English statutes (see 4 Edw. I., ch. 6) the words "*dedi et concessi*"

had the effect of a warranty, and this idea has been preserved in the statutes of many American states.

kind. It would seem that this diversity has arisen, to some extent at least, through a misconception of the office which this form of conveyance is supposed to perform, and to some extent also of the real nature of proprietary right. Thus, a distinction has been drawn between a conveyance of the right, title and interest which a grantor may have in land and a conveyance of the land itself. Where a deed purports to convey only the former, then it is usually classed as a quitclaim, irrespective of the words of grant employed, and is not permitted to sustain the defense of an innocent purchaser whose title is assailed in an action of ejectment.⁹⁹

While it is admitted that a quitclaim is as effectual as a deed of bargain and sale,¹ yet this effect applies only to present interests.² It does not extend to after-acquired title,³ nor is a grantee thereunder regarded as a purchaser for value without notice.⁴ These are the generally received views and they have a marked effect upon all questions of disputed title to which they may apply, whether the action be for ejectment or to quiet and confirm title.

But while the rule is general, that a person who takes by quitclaim deed is not regarded as a purchaser in good faith, without notice of outstanding titles and equities,⁵ and that in accepting such a deed he assumes the risk of title and is bound, at his peril, to inquire and ascertain what outstanding rights exist, if any,⁶ yet this rule is not without some qualification. A quitclaim deed, when recorded, will take precedence of a prior unrecorded warranty deed from the same grantor, if the purchaser under the quit claim had no notice of the prior deed and

⁹⁹ Garrett v. Christopher, 74 Tex. 453; May v. Le Claire, 11 Wall. (U. S.) 217; Barclift v. Lillie, 82 Ala. 319; Moelle v. Sherwood, 148 U. S. 21.

¹ Johnson v. Williams, 37 Kan. 179; Morgan v. Clayton, 61 Ill. 35; Rowe v. Pecker, 30 Ind. 154.

² Bennison v. Aiken, 102 Ill. 284; Pleasants v. Blodgett, 39 Neb. 741; Johnson v. Williams, 37 Kan. 179.

³ Holbrook v. Debo, 99 Ill. 372; Harriman v. Gray, 49 Me. 538.

⁴ Pleasants v. Blodgett, 39 Neb. 741; Stoffel v. Schroeder, 62 Mo. 147.

⁵ Carter v. Wise, 39 Tex. 273; Springer v. Brattle, 46 Iowa, 688.

⁶ Botsford v. Wilson, 75 Ill. 132; Thorp v. Coal Co., 48 N. Y. 253; Winkler v. Miller, 54 Iowa, 476.

there are no words in his deed suggestive of an earlier conveyance.⁷ To this extent a quitclaim deed has the same probative force and evidentiary value as a warranty deed.

§ 303. **Deeds to take effect at grantor's death.**—There is much confusion of authority with respect to the legal effect of a deed which purports to operate only at or after the death of the grantor. The confusion does not lie in the rules of conveying, for on this point the authorities are substantially in accord, but in the application of the rules to the facts of particular cases. The vital question presented by a deed of this kind is: Shall the instrument be construed as a present conveyance or shall it be deemed of a testamentary character only? It is said that the solution of this question turns upon the question of the grantor's intention. If it shall be found that he intended to convey a present interest to the grantee, then the instrument is a deed, and the mere fact that the enjoyment of such interest is postponed until the death of the grantor is an immaterial circumstance.⁸ If a vested right passes, this is enough to stamp the character of the instrument. In such event, if the right transferred is to some specific thing then owned by the person executing the instrument, or within his gift, the transaction is not distinguishable from other forms of conveyance by deed, and effect should be given to it accordingly.⁹ Where the deed is made for a valuable consideration all of the intendments will be in favor of sustaining the grant, although in most cases of this kind the conveyance is voluntary. But, generally, where an instrument, in form a deed, conveys a present interest, that is, conveys an interest in words of present grant notwithstanding it is to be enjoyed only in the future, it is operative as a deed, and not as a will, and the interest or estate of the grantee

⁷ *Brown v. Coal Oil Co.*, 97 Ill. 214; *Graff v. Middleton*, 43 Cal. 341; *Marshall v. Roberts*, 18 Minn. 405. 367; *Abbott v. Holway*, 72 Me. 298; *Shackelton v. Seabee*, 86 Ill. 616.

⁸ *McDaniel v. Johns*, 45 Miss. 632; *White v. Hopkins*, 80 Ga. 154; *Mitchell v. Mitchell*, 108 N. C. 542; *Dreisbach v. Serfass*, 126 Pa. St. 32.

⁹ *Wilson v. Carrico*, 140 Ind. 533; *Cates v. Cates*, 135 Ind. 272; *White v. Hopkins*, 80 Ga. 154; *Graves v. Atwood*, 52 Conn. 512; *Bunch v. Nicks*, 50 Ark.

cannot be defeated by the grantor after the execution of the deed, even though it is voluntary.¹⁰

The true test of the character of an instrument, as to whether it is a will, is not the maker's realization that it is a will, but his intention to create a revocable disposition of his property, to accrue and take effect only upon his death, and passing no present interest. A deed, on the other hand, must transfer to the grantee a present interest in some part of the grantor's estate, and which is in no way dependent on his death. But it is important to note the distinction between the interest transferred and the enjoyment of the interest. The former must be *in presenti*, the latter may be made to commence *in futuro*, and to depend for its commencement upon the termination of an existing life or of an intermediate estate.¹¹ If the language employed is appropriate to a conveyance of a present interest, and the instrument is duly executed and delivered, then, if these facts are found and it further appears that the grantor was under no disability and was not impelled by fraud or fear, the instrument will be regarded as a deed and such construction should be given to it as the circumstances of the case may require.¹²

On the other hand, a conveyance not to take effect until the death of the grantor is an attempt to make a testamentary disposition without complying with statute of wills,¹³ and is therefore void.¹⁴ The question is one of great difficulty, however, and a review of the decided cases shows that it is involved in much doubt and uncertainty. The tendency of the courts seems to be to uphold deeds of this kind whenever possible. The fact that the parties have evidenced the grant by an instrument in form a deed is a strong circumstance to show that the intention was to make a deed and not a will, and in many of

¹⁰ *McDaniel v. Johns*, 45 Miss. 632; *Mattocks v. Brown*, 103 Pa. St. 16.

¹¹ *Nichols v. Emery*, 109 Cal. 323.

¹² *McDaniel v. Johns*, 45 Miss. 632; *White v. Hopkins*, 80 Ga. 154; *Blanchard v. Morey*, 56 Vt. 170.

¹³ *Cunningham v. Davis*, 62 Miss. 366; *Turner v. Scott*, 51 Pa. 126.

¹⁴ *Wilson v. Wilson*, 158 Ill. 567; *Leaver v. Gauss*, 62 Iowa, 314; *Carlton v. Cameron*, 54 Tex. 72; *Bigley v. Souvey*, 45 Mich. 370.

the cases where the language employed verges very close on the "danger line," judicial construction has been somewhat strained to save the instrument from being a nullity.¹⁵

§ 304. **Deed by donee of a power.**—But few questions can arise to affect the title to land acquired through a deed made in pursuance of a general power, and such questions will usually relate to the execution or method of exercise of the power. Further, it is a general rule that powers of sale are to be given a liberal construction in order to carry into effect the purpose and intention of the donor. At the same time it must be remembered that a power of disposition does not imply ownership, but is a mere authority conferred by the instrument creating it,¹⁶ and any conditions attached by the donor to the execution of the power must be strictly complied with,¹⁷ however unessential they may seem.¹⁸ While resort is frequently had to equity to set aside conveyances by the donee of a power, where such power has not been executed according to its expressed conditions, yet this is by no means necessary in a majority of cases, and it has repeatedly been held that a deed so made may be successfully assailed in a proceeding by ejectment.¹⁹

But while liberal intendments will be made for the execution of a general power yet where the power under which a conveyance purports to have been made is special, as where it can be exercised only on the happening of a certain event, the transaction will be closely scrutinized and a strict compliance must be shown. The general rule is that a power similar to that just mentioned can be exercised only in the mode, at the time, and upon the conditions prescribed in the instrument creating it,²⁰ and of this all persons interested must, at their peril, take notice.²¹ But this rule, while it is unquestioned, applies only

¹⁵ See *Wilson v. Carrico*, 140 Ind. 533; *Abbott v. Holway*, 72 Me. 298; *Shackleton v. Sebree*, 86 Ill. 616.

¹⁶ *Burleigh v. Clough*, 52 N. H. 267; *Ducker v. Burnham*, 146 Ill. 9.

¹⁷ *Sears v. Livermore*, 17 Iowa, 297; *Cranston v. Crane*, 97 Mass. 459.

¹⁸ *Sharpley v. Plant*, 79 Miss. 175, 28 So. Rep. 799.

¹⁹ See *Hull v. Culver*, 34 Conn. 403; *Minot v. Prescott*, 14 Mass. 496; *Scheidt v. Crecellius*, 94 Mo. 322.

²⁰ *Matthews v. Capshaw*, 109 Tenn. 480, 72 S. W. Rep. 954, 97 Am. St. 854; *Ervine's Appeal*, 16 Pa. St. 256; *Sharpley v. Plant*, 79 Miss. 175, 28 So. Rep. 799.

²¹ *Matthews v. Capshaw*, 109 Tenn. 480.

where the condition upon which the power is to be exercised is upon the happening of a certain event or independent fact, such as the majority, marriage, or death of some person named, which may be ascertained by anyone with equal certainty. It does not apply where the determination of the event upon which the power is limited requires the exercise of judgment and discretion, as to which there may be an honest difference of opinion; and in cases of this character it has been held that the decision of the donee of the power is conclusive, and that a sale made in pursuance of the power, if conducted in good faith, will be allowed to stand, even though it may afterward appear that the judgment of the donee was erroneous.²²

In making proof of a deed executed by the donee of a power the grant of the power is an essential circumstance, whether it be a simple power of attorney or a power of disposition under the statute of uses. In the latter case some of the authorities hold that there must be an express intention manifested to work under the power and that special reference thereto must be made in the deed.²³ This, it is contended, will always be the case where the donee of the power also possesses a personal interest in the land, and should there be an omission in this respect the deed will be taken as a conveyance of the grantor's personal interest and not as an execution of the power.²⁴ But this rule, though at one time of great potency, has undergone many modifications for the sake of sustaining and not defeating what may appear to be the actual intention of the grantor.²⁵ The trend of later decisions strongly tends to establish the doctrine that it is not necessary that an intention to execute a power of disposal should expressly appear on the face of the deed.²⁶ If the intention can be collected from all the circum-

²² See *Matthews v. Capshaw*, 109 Tenn. 480; *Randolph v. Land Co.*, 104 Ala. 355, 16 So. Rep. 126, 53 Am. St. 64.

²³ This is the old English doctrine. It has been followed in some of the earlier American cases, and has had a marked effect on later decisions, but it cannot be regarded as an inflex-

ible rule at the present time, notwithstanding it is so stated in a number of modern textbooks.

²⁴ See 4 Kent. Com. 335.

²⁵ *Lumber Co. v. O'Neal*, 131 Ala. 117, 30 So. Rep. 466.

²⁶ *McRae v. McDonald*, 57 Ala. 423.

stances;²⁷ or if the transaction is not fairly susceptible of any other interpretation,²⁸ as where the deed cannot operate in any other way,²⁹ this has been held sufficient. But, if from a consideration of all the circumstances the intention still remains doubtful, such doubt will prevent the deed from being deemed an execution of the power.³⁰

§ 305. **Lost deeds.**—The general subject of primary and secondary evidence has already been discussed³¹ and the rules which apply where secondary evidence is offered have been sufficiently considered. But in the trial of disputed titles it will frequently happen that original muniments of title cannot be produced, and while the rule is inflexible that the title to land cannot be established by parol, yet parol evidence of writings necessary to establish such title may be and often is received. This is true in the case of lost deeds.³²

Where it is desired to prove the contents or purport of a lost deed it will be necessary, in the first instance, to offer some preliminary proof, both of the actual existence of the instrument at one time and of its subsequent loss or destruction. This is addressed, not to the jury but to the court, for the purpose of establishing the right to introduce secondary evidence of the contents of the lost paper.³³ Where a proper foundation has been laid for the introduction of secondary evidence, as where it is clearly shown by the preliminary proof that the deed is either lost or destroyed³⁴ and that it is not in the power of the

²⁷ *Matthews v. McDade*, 72 Ala. 387; *Funk v. Eggleston*, 92 Ill. 515.

²⁸ *Bishop v. Remple*, 11 Ohio St. 277; *Mason v. Wheeler*, 19 R. I. 21.

²⁹ *Lumber Co. v. O'Neal*, 131 Ala. 117; *Terry v. Rodahan*, 79 Ga. 278; *Blagge v. Miles*, 1 Story, 427, is the leading case on this subject in this country.

³⁰ *Mason v. Wheeler*, 19 R. I. 21.

³¹ See § 226, *ante*.

³² *State v. Eisenmeyer*, 94 Ill. 96.

³³ *Loewe v. Reismann*, 8 Ill. App. 525; *Dowden v. Wilson*, 71

Ill. 485. A finding by the court of the execution of a lost unrecorded deed is justified by evidence that it was recited in a deed subsequently executed by the grantee, and the testimony of a witness that he found such a deed while examining his grandfather's papers. *Arents v. Long Island R. Co.*, 156 N. Y. 1. The amount of evidence to show the existence of the original will vary with the circumstances of each case. Where no direct issue is made upon the fact, slight evidence will be sufficient. *Doe v. Aiken*, 31 Fed. Rep. 393.

³⁴ It has been held that where

party to produce it,³⁵ its place may be supplied by an abstract of title made in the usual course of business where the record as well as the deed has also been destroyed,³⁶ or, its contents may be shown by witnesses who know of what such contents consisted,³⁷ if the court is satisfied that no higher evidence can be produced. An examined copy is admissible under the rules of the common law,³⁸ and, by statute, a certified copy of the record, where the deed has been registered, may be received to supply the place of the original.³⁹ A lost instrument cannot be proved by a certified copy of its record in the absence of a statute which expressly authorizes such evidence,⁴⁰ but in a majority of the states statutes of this kind are now in force, and when a foundation for introducing secondary evidence of the contents of a registered deed has been properly laid, a certified copy is generally admissible.⁴¹ Contents of lost deeds may always be proved by the record thereof,⁴² which, by statute, is

a grantee in a deed, who was the custodian thereof, testified positively that the deed had been lost, this was sufficient to allow the introduction of parol testimony as to its contents, without showing that search had been made for it. *Postel v. Palmer*, 71 Iowa, 157. But, generally, when the testimony simply is that an instrument is lost, with no showing of a search, or other facts to support the statement of loss, the court will refuse to adopt the conclusion of the witness, and secondary evidence will be rejected. *Anglo-American, etc. Co. v. Cannon*, 31 Fed. Rep. 313.

³⁵ *Taylor v. McIrvin*, 94 Ill. 488; *Rullman v. Barr*, 54 Kan. 643; *Baldwin v. Burt*, 43 Neb. 245; *Windom v. Brown*, 65 Minn. 394.

³⁶ *Richley v. Farrell*, 69 Ill. 264. And see *Butler v. Railway Co.*, 85 Mich. 246.

³⁷ *Hobbs v. Beard*, 43 S. C. 370. Evidence that the grantee

named in an alleged lost deed exhibited it to witness, telling him that it was a deed of the premises in question, is insufficient, in the absence of satisfactory evidence that the paper so exhibited was properly acknowledged, to establish it as a lost deed, particularly in the face of convincing evidence that the alleged grantor continued in possession of the premises and continued to be recognized as their owner by the alleged grantee. *Stovall v. Judah*, 74 Miss. 747, 21 So. Rep. 614.

³⁸ *Otto v. Trump*, 115 Pa. 425.

³⁹ *Whidden v. Lumber Co.*, 98 Ga. 700.

⁴⁰ *Union P. R. Co. v. Reed*, 80 Fed. Rep. 234.

⁴¹ Consult local statutes. The text states the prevailing rule.

⁴² This is statutory in all of the states, but the text states the general statutory doctrine. See *State v. Crocker*, 49 S. C. 242; *Stanley v. Smith*, 15 Oreg. 505.

generally made evidence of equal dignity with the original. This method of proof, when it can be resorted to, is much more satisfactory than a certified copy of the record.

The provisions of the statute will determine most questions that may arise, with reference to the admissibility and evidentiary value of records, but, as a rule and in the absence of specific provision to the contrary, neither the record of a deed nor a certified copy thereof is admissible in evidence without first accounting for the non-production of the original.⁴³ The greatest difficulty, in cases of this kind, will be experienced where the alleged lost deed has never been recorded, and the rules respecting the establishment of title under such an instrument are very strict.⁴⁴

§ 306. Continued—Presumption of lost deed.—Long continued possession and use of land in itself creates a presumption of lawful origin,⁴⁵ and upon this presumption it may further be presumed that the entry was under a grant by a deed which has been lost.⁴⁶ Courts have always indulged in presumptions of this kind to quiet and confirm long possession, which might otherwise be disturbed by reason of inability to produce muniments of title, actually given but lost, and of which the witnesses have passed away or their recollection become dimmed and imperfect. In most cases these presumptions arise in actions to quiet title, yet where there has been an ouster there is no reason why they may not also be employed in actions of ejectment.

Although the presumption of a deed may be rebutted by proof of facts inconsistent with its supposed existence, yet, where no such facts are shown, and the things done and the things omitted with regard to the property, by the respective parties, for long periods of time after the execution of the supposed deed

⁴³ *Peerce v. Georger*, 103 Mo. 540.

⁴⁴ *Day v. Philbrook*, 89 Me. 462.

⁴⁵ *Fitzgerald v. Quinn*, 165 Ill. 354; *Dunn v. Eaton*, 92 Tenn. 743.

⁴⁶ This is an ancient doctrine of the common law, growing out

of the old ideas concerning prescription. The tendency of modern law is to restrict the doctrine to periods analogous to those provided for an entry upon lands by the statutes of limitation. *Mission v. Cronin*, 143 N. Y. 624.

can be explained satisfactorily only on the hypothesis of its existence, it may be conclusively presumed that a proper conveyance was in fact made.⁴⁷ In every instance, however, the presumption of a grant arising from long possession and enjoyment, short of the period of limitation, is one of fact and not of law.⁴⁸

II. DEEDS OF OFFICIALS AND FIDUCIARIES.

§ 307. Generally considered.	§ 319. Purchaser at void judicial sale.
308. Sheriff's deeds.	320. Writ of assistance.
309. Recitals in sheriff's deeds.	321. Administrator's deeds.
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317. Master's and commissioner's deeds.	329. Continued—Defects appearing upon the deed.
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§ 307. **Generally considered.**—No small number of the land titles of the country are derived, mediately or immediately, through conveyances made by executive or ministerial officers, and in actions concerning title the deeds executed to evidence such conveyances often play an important part. While the limits of this book preclude anything like exhaustive treatment of this branch of our subject it is yet a topic that cannot be passed without some mention, and in the paragraphs immediately following an attempt will be made to discuss in brief terms

⁴⁷ *Smith v. Cornelius*, 41 W. Va. 59; *Hasson v. Klee*, 181 Pa. 117; *Sulpher Mines Co. v. Thompson*, 93 Va. 293; *Dunn v. Eaton*, 92 Tenn. 743.

⁴⁸ *Hernden v. Vick*, 89 Tex. 469.

some of the more salient features which it presents. More stress will be placed upon deeds made by the officers of courts in execution of judgments and decrees than upon the deeds of purely ministerial officers like trustees.

§ 308. **Sheriff's deeds.**—In ejectment by the purchaser of land at sheriff's sale, against the defendant in the judgment upon which it was sold, all that is necessary to be shown, as a general rule, is the rendition of the judgment and the proceedings thereunder. As against such defendant the judgment, execution, and deed from the sheriff, are conclusive, and nothing more is required on the part of the plaintiff to establish a *prima facie* title.⁴⁹ The theory in such cases is, that the purchaser at a sheriff's sale comes into exactly the same estate as the judgment debtor had, and when the latter is sued in ejectment, by the purchaser under the execution, to recover possession of the land sold, he cannot dispute the plaintiff's title.⁵⁰ On the other hand, it must ever be borne in mind that the power of the sheriff to make a deed depends upon the validity of the anterior proceedings, hence, if the judgment or any of the resulting steps are so defective as to render the sale void, these matters may always be shown by the debtor or those claiming under him in defending against an action for possession.⁵¹

It will be presumed, in support of a sheriff's deed, that all prior proceedings up to the execution of the deed were regular and in conformity to statutory requirements,⁵² and while the deed itself, standing alone, should show upon its face the authority of the officer as well as the essential requirements of a valid sale, yet defects, in this respect, are not fatal. The judgment, execution and return, as well as the deed, are elements of title, and the authorities are practically unanimous in their holdings that a deed may always be aided by the return upon the execution showing a due compliance with law.⁵³

⁴⁹ Drake v. Brown, 68 Pa. St. 223; Riddle v. Bush, 27 Tex. 675; Lennox v. Clark, 52 Mo. 115; Hughes v. Watt, 26 Ark. 228; Splahn v. Gillespie, 48 Ind. 397; Fisher v. Eslaman, 68 Ill. 78; Den v. Despreaux, 12 N. J. L. 182.

⁵⁰ Gould v. Hendrickson, 96 Ill. 599.

⁵¹ Phillips v. Hogart, 113 Cal. 552, 54 Am. St. 369.

⁵² Smith v. Crosby, 86 Tex. 15, 40 Am. St. 818; Hill v. Reynolds, 93 Mo. 25, 74 Am. St. 329.

⁵³ Welsh v. Joy, 13 Pick.

A sheriff's deed made in pursuance of a sale on execution must be to the person to whom the certificate of purchase was issued or to his assignee, and if the deed is made to another, even though it recites that he is the assignee of the certificate, it is a nullity, if, in fact, the certificate was not assigned.⁵⁴ It would seem, therefore, where the claimant asserts title as an assignee of the purchaser the assignment should be proved together with the other matters. This, however, is not essential, and is recommended merely as a cautionary measure, for the recital in a sheriff's deed of a certificate of a sale, and the assignment thereof, is evidence of their existence, and, after the execution of the deed such certificate and assignments thereof cease to be essential muniments of title.⁵⁵

As before remarked, a purchaser at execution sale takes only the title of the execution debtor, and while the deed, execution and judgment are sufficient to establish this fact and to make out a *prima facie* case, yet, where the defendant in ejectment is a stranger to the original suit in which the judgment was rendered it is generally essential to show that the defendant in execution had some estate or interest in the lands sold on which the judgment could operate.⁵⁶ In other words, as the plaintiff claims under the title of the judgment debtor it is necessary that he produce the same evidence of proprietary right as would be required if the deed had been from the judgment debtor direct.

§ 309. **Recitals in sheriff's deeds.**—There are not wanting authorities which hold that the recitals in a sheriff's deed, particularly with respect to his own acts, are conclusive as between the parties and those in privity with them, and that such recitals cannot be contradicted or overturned by parol evidence.⁵⁷ But this doctrine is rejected in many states as unsound in principle and dangerous in its tendencies. At best, it is contended, such recitals are nothing more than *prima facie*

(Mass.) 477; *Stinson v. Ross*, 51 Me. 556; *Hayward v. Cain*, 110 Mass. 273. ⁵⁶ *Hendon v. White*, 52 Ala. 557.

⁵⁴ *Carpenter v. Sherfy*, 71 Ill. 427. Compare *Bowman v. Davis*, 39 Iowa, 398. ⁵⁷ *Zabriskie v. Meade*, 2 Nev. 285; *Durette v. Briggs*, 47 Mo. 356; *Pringle v. Dunn*, 37 Wis. 449; *Robertson v. Guerin*, 50

⁵⁵ *Gardner v. Eberhart*, 82 Ill. 316. Tex. 317.

evidence of the facts recited,⁵⁸ and when relating to the essential matters of judgment and execution they have frequently been held not even evidence of the existence of the fact recited.⁵⁹ Indeed, to hold otherwise would be to give to a sheriff an authority to recite himself into a power he never had and to make valid a deed otherwise fatally defective.⁶⁰ The general rule, therefore, would seem to be that the recitals of a sheriff's deed are to be regarded only as matters of inducement,⁶¹ but, if the facts are properly stated they may be taken as proved until the contrary is shown.⁶² With respect to the essential facts of judgment and execution it is generally necessary to make independent proof.⁶³ The mere recital of a judgment and sale thereunder, without showing any writ upon which the sheriff acted, is insufficient to show title in the grantee.⁶⁴ In all cases the judgment is the foundation of title,⁶⁵ and, as a rule, proof of same is indispensable to validity.⁶⁶

As the sheriff is only the executor of a naked power it follows that his deed should show substantial compliance with the terms creating the power as well as a proper execution, yet where it shows a substantial compliance with statutory requirements it will not be invalidated by ambiguous recitals or omissions which do not mislead.⁶⁷

§ 310. Interest levied upon.—As a general proposition a sheriff's deed does not purport to be a specific conveyance of the land therein described, but only of all the right, title and interest therein of the defendant in execution. This, however, is an immaterial circumstance. A conveyance of a right in

⁵⁸ *Farrior v. Houston*, 100 N. C. 369; *Willamette Real Estate Co. v. Hendrix*, 28 Oreg. 485; *Carbine v. Morris*, 92 Ill. 555.

⁵⁹ *Phillips v. Hogart*, 113 Cal. 552.

⁶⁰ *Phillips v. Hogart*, 113 Cal. 552.

⁶¹ *Leland v. Wilson*, 34 Tex. 79; *Warner v. Sharp*, 53 Mo. 598; *Jones v. Scott*, 71 N. C. 192.

⁶² *Chase v. Whiting*, 30 Wis. 544; *Lamar v. Turner*, 48 Ga. 329; *Willamette R. E. Co. v. Hendrix*, 28 Oreg. 485.

⁶³ *Ayers v. Roper*, 111 Cal. 651; *Leland v. Wilson*, 34 Tex. 79.

⁶⁴ *Burt v. Hasselman*, 139 Ind. 196.

⁶⁵ *Todd v. Philhour*, 24 N. J. L. 796; *Leland v. Wilson*, 34 Tex. 79.

⁶⁶ *Carbine v. Morris*, 92 Ill. 555.

⁶⁷ *Allen v. Sales*, 56 Mo. 28; *Jones v. Scott*, 71 N. C. 192; *Keith v. Keith*, 104 Ill. 397.

and to property necessarily operates as a transfer of the property so far as the ownership in question may extend. This is always the effect given to a voluntary conveyance and the same rule applies to levies, sales and deeds made by sheriff's in obedience to executions.⁶⁸

Where land is sold under execution it should be designated with reasonable certainty, but neither the creditor at whose instance the land is sold nor the officer making the sale, is required to ascertain and particularly describe the debtor's interest in such lands. It is enough that the interest, whatever it may be, has been levied upon and the sheriff's deed will pass such interest, whether it extends to the whole tract or only to an undivided part.⁶⁹

There are a few cases that seem to militate against the propositions last stated and which hold that the estate of the judgment debtor must be specifically levied upon, and where a deed recited only a sale of the "interest" of the judgment debtor, without describing the character of the interest, that is, without stating whether it was a term, a life estate or a fee, the defect was held fatal.⁷⁰ This, however, does not represent the prevailing doctrine and is supported by very doubtful principle.

§ 311. **Description of land sold.**—The general rules which apply to descriptions in deeds executed as voluntary conveyances apply in the main to deeds executed by the sheriff in pursuance of involuntary sales. In every instance the land must be designated with reasonable certainty, and this would seem to require that it should be so described as to permit its easy and accurate location.⁷¹ The policy of the law, however, is to uphold deeds of this character and every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with legal rules, the objects they are intended to

⁶⁸ *Smith v. Crosby*, 86 Tex. 15; 42 Miss. 18; *Cotton v. Carlisle*,
Humphreys v. Wade, 84 Ky. 85 Ala. 175.
400; *Woodward v. Sartwell*, 129
⁷⁰ See *Whately v. Newsom*, 10
Mass. 214; *Millet v. Blake*, 81
Ga. 74; *Williams v. Baynes*, 84
Me. 531; *Lewis v. Chapman*, 59
Ga. 116.
Mo. 381.

⁷¹ *Herrick v. Morrill*, 37 Minn.
⁶⁹ *Smith v. Crosby*, 86 Tex. 254; *Pfeiffer v. Lindsay*, 66 Tex.
15; *Greer v. Wintersmith*, 85 123.
Ky. 516; *Walton v. Hargroves*,

accomplish.⁷² If the deed contains an accurate but general description extrinsic evidence may be resorted to for the purpose of locating and identifying the land intended to be conveyed,⁷³ and the description should be deemed sufficient. The rules of construction apply to sheriff's deeds in much the same way as to deeds between individuals generally.

§ 312. **Sale under execution on dormant judgment.**—It is a general statutory provision, that an execution shall not issue upon a judgment, after a certain period has elapsed, without leave of court. This is a retention of the common-law doctrine respecting executions adapted to the exigencies of modern practice. At common law no execution could be issued upon a judgment after the expiration of a year and a day unless one had been taken out and returned during that period. If this was not done the judgment became dormant and so continued until revived by a writ of *scire facias*. This was a writ commanding the defendant to show cause, if any there should be, why such execution should not issue and was designed to enable the defendant to plead payment or any other matter which would show that the judgment had been satisfied or discharged.

The statutes, generally, have either preserved the essence of this ancient proceeding or provided a substitute therefor. As a rule a judgment ceases to be operative after a certain time subsequent to its rendition and unless there has been a revival of some kind, with notice to the party to be affected, no execution is permitted to be issued thereon. In all substantial particulars these provisions of the statutes are the same and are intended to effect the same ends. They prescribe the modes to be pursued to obtain leave of court to issue execution and secure the fruits of dormant judgments, and are intended to afford the same protection to the judgment debtor as was given at common law by *scire facias*.⁷⁴

But it may happen that an execution is taken out after the statutory limit and without leave of court, and that a sale thereunder is had. In such event a question is presented as to

⁷² *White v. Luning*, 93 U. S. 514.

⁷⁴ *Eddy v. Caldwell*, 23 Oreg. 163; 37 Am. St. 672.

⁷³ *Smith v. Crosby*, 86 Tex. 15.

the validity of the sale and the rights that may be exercised thereunder either by way of claim or defense. It would seem that at common law an execution issued without a proceeding by *scire facias* was not void but merely voidable, and might be set aside on the ground of irregularity. The same construction has been given to the statutory proceeding by the courts of a number of states,⁷⁶ and sales made by virtue of an execution so issued have been sustained in a number of instances.⁷⁶

On the other hand there are not wanting decisions which construe the statute strictly and which preclude the issue of execution after the statutory limit has expired.⁷⁷

§ 313. **Sale under execution issued after judgment is barred.**—A different question is presented in the case of a sale made under an execution issued upon a judgment that at the time of such issue was barred by the statute of limitations. Whatever doubts may exist with respect to dormant judgments must be resolved where the judgment is dead, and no execution can issue thereon, nor can a valid levy and sale be made thereunder.⁷⁸

§ 314. **Purchaser under void execution sale.**—It has been held that where a sheriff's sale of land is set aside and the deed given in pursuance thereof is vacated, after the purchaser has entered into possession, inasmuch as the only muniment of his title is thereby destroyed his continued possession of the land, thereafter, is that of a mere trespasser.⁷⁹ The position of a purchaser in such a case is not materially different from one in possession under a sale made upon a satisfied or vacated judgment, a subject that will be considered in the paragraph following.

§ 315. **Sale under satisfied judgment.**—The rule of *caveat emptor* applies to all purchasers at execution sale, and if land is sold thereunder, when the judgment upon which the

⁷⁶ See *Mariner v. Coon*, 16 Wis. 468; *Bank of Genesee v. Spencer*, 18 N. Y. 154; *Lawrence v. Grambling*, 13 S. C. 120..

⁷⁸ *Eddy v. Caldwell*, 23 Oreg. 163. And see *Ludeman v. Hirth*, 96 Mich. 17.

⁷⁷ See *Dorland v. Hanson*, 81 Cal. 202; *Garvin v. Garvin*, 34 S. C. 388; *Lakin v. McCormick*, 81 Iowa, 545.

⁷⁹ *Ludeman v. Hirth*, 96 Mich. 17; *Isaac v. Swift*, 10 Cal. 71.

⁷⁹ *Scranton v. Ballard*, 64 Ala. 402.

execution is based has in fact been paid or otherwise satisfied, such sale will be void as against the owner of the land and the purchaser will not be protected against him.⁸⁰ One who derails title through a sale of this kind must show, not only the execution and sale, but also a valid and subsisting judgment in support thereof,⁸¹ and it has been held, that notwithstanding there may have been a judgment in existence at the time the writ was issued yet if it was vacated or satisfied before sale the power to make the sale was destroyed; and the result is the same, it is contended, whether the judgment was directly satisfied by payment or vacated by an order of court, or superseded by any proceeding whose effect is to prevent its execution.⁸²

The theory involved in the foregoing is, that a sheriff, in making a sale, acts under a naked statutory power which is dependent for its existence upon the existence of the judgment that he is attempting to execute, and if there is no judgment in support of the writ of execution when he makes the sale the power to make such sale is wanting,⁸³ and no title passes, even to an innocent purchaser.⁸⁴ To this general proposition there can be no dissent where the judgment has been satisfied of record, or where it has been vacated or superseded by some judicial act.

There are cases which hold, that where land has been levied upon and sold under a judgment which has in fact been paid, then, notwithstanding that it has not been satisfied of record, the owner may treat the sale as void and recover the land in an action of ejectment.⁸⁵ Upon this point, however, the author-

⁸⁰ *Pope v. Benster*, 42 Neb. 394; *Soukup v. Investment Co.*, 84 Iowa, 448; *Bullard v. McArdle*, 98 Cal. 355, 35 Am. St. 176.

⁸¹ *Blood v. Light*, 38 Cal. 654; *Chapin v. McLaren*, 105 Ind. 563; *Shaffer v. McCrackin*, 90 Iowa, 578, 48 Am. St. 465.

⁸² *Bullard v. McArdle*, 98 Cal. 355; *Craft v. Merrill*, 14 N. Y. 465.

⁸³ See *Bullard v. McArdle*, 98 Cal. 355; *Frost v. Savings Bank*, 70 N. Y. 553; *McClure v. Logan*, 59 Mo. 234; *Boos v. Morgan*, 130 Ind. 305.

⁸⁴ *Shaffer v. McCrackin*, 90 Iowa, 578; *Craft v. Merrill*, 14 N. Y. 461.

⁸⁵ *Pope v. Benster*, 42 Neb. 394, 47 Am. St. 703. And see *Craft v. Merrill*, 14 N. Y. 456; *Shaffer v. McCrackin*, 90 Iowa, 578.

ities are not agreed, and it has further been held that while the parties to a judgment may settle the same upon any terms they may mutually decide upon, and such settlement, as between themselves, will be valid, yet they cannot by such acts destroy the stable evidence of the record to the prejudice of others, and that the title of a *bona fide* purchaser at execution sale made under a judgment in full force and unsatisfied of record, cannot be defeated by parol proof of a payment of the judgment debt before the sale.⁸⁶

§ 316. **Confirmation of execution sale.**—As a rule no confirmation is required of sales made by the sheriff under an execution. In this respect they differ materially from sales made under a decree. But in some states a *pro forma* confirmation is made necessary by statute, the effect being that of an adjudication by the court that the proceedings of the officer as they may appear of record are regular,⁸⁷ and that the requirements of the statute have been complied with.⁸⁸ Where this procedure is prescribed, a failure to have a sale in satisfaction of a judgment in an action at law confirmed is a mere irregularity, which will not defeat the purchaser's title where all of the other steps are shown to have been regularly taken in conformity with the statute.⁸⁹ It is conceded that there are no substantial reasons requiring the confirmation of such sales, and that a failure to confirm should have no more serious result than to require proof of the essential matters upon which the sale is based.

§ 317. **Master's and commissioner's deeds.**—Where lands are sold by order of court the sale is usually intrusted to a master in chancery, or such other corresponding officer as local procedure may indicate, who also executes the deed of conveyance. The title thus acquired differs in no material respect from that derived under execution sale. The purchaser succeeds to the interest of the defendant in the suit, which he takes subject to all its infirmities, and is presumed to purchase

⁸⁶ *Nichols v. Dissler*, 31 N. J. L. 461, 86 Am. Dec. 219.

⁸⁷ *Baxter v. O'Leary*, 10 S. Dak. 150.

⁸⁸ *Koehler v. Ball*, 2 Kan. 160.

⁸⁹ Consult *Baxter v. O'Leary*, 10 S. Dak. 150, 66 Am. St. 702;

Challis v. Wise, 2 Kan. 193; *White Crow v. White Wing*, 3

Kan. 270.

with full knowledge of all defects and pre-existent liens.⁹⁰ He buys at his peril and must suffer any loss that may occur in the event that his title is afterward disputed or denied,⁹¹ nor will the fact that the court is regarded as the vendor confer upon him any additional rights.⁹² This naturally follows from the reason that the officer selling has no power to warrant the title and because the purchaser is presumed to have examined the title and to know what he is acquiring by his purchase.⁹³ But this applies only to defects of title pre-existing, and not to irregularities attending the sale, for no principle of law is better settled than that, where a court has jurisdiction of the subject-matter and of the persons of the parties, its judgment or decree, when questioned collaterally, will be held valid and conclusive even though the court may have proceeded irregularly, and a purchaser in good faith under its judgment or decree will be protected.⁹⁴ No mere errors can have any effect upon the sale or the title acquired under it.⁹⁵

But as it is the policy of the law to invest its ministerial officers with only a mere naked power to sell such title as the defendant in the suit had, without warranty or any terms other than those imposed by law, it follows that a purchaser at such sale not only takes the risk of title but also of the validity of the proceeding under which the sale is made.⁹⁶ If the court was without jurisdiction then the sale is void, everywhere and in all courts and may be attacked collaterally,⁹⁷ but, as a rule, nothing can be urged against a purchaser under a decree that does not go to the jurisdiction of the court pronouncing it,⁹⁸ while every presumption will be indulged in to support the decree and the title derived under it.⁹⁹

⁹⁰ *Guynn v. McCauley*, 32 Ark. 97; *Capehart v. Dowery*, 10 W. Va. 130; *Bishop v. O'Connor*, 69 Ill. 431.

⁹¹ *Tilley v. Bridges*, 105 Ill. 336.

⁹² *Parrat v. Neligh*, 7 Neb. 546; *Thompson v. Craighead*, 32 Ark. 291.

⁹³ *Conwell v. Watkins*, 71 Ill. 488.

⁹⁴ *Harris v. Lester*, 80 Ill. 307.

⁹⁵ *Wing v. Dodge*, 80 Ill. 564.

⁹⁶ *Bishop v. O'Conner*, 69 Ill. 431.

⁹⁷ *Campbell v. McCahan*, 41 Ill. 45; *Hollingsworth v. Bagley*, 35 Tex. 345.

⁹⁸ *Hedges v. Mace*, 72 Ill. 472.

⁹⁹ *Wenner v. Thornton*, 98 Ill. 156.

§ 318. **Proof of master's deed.**—The effect to be given to official deeds generally is largely dependent on statutes, particularly in states which employ a reformed code of procedure, and therefore in determining the questions of admissibility and proof, resort, in many cases, must necessarily be had to such statutes. In its essential force as an instrument of conveyance a master's deed is only one incident of devolution of title, and depends upon a number of other incidents for validity and effect. By statute such deeds are usually made *prima facie* evidence that the provisions of law relating to the sale have been complied with, and in case of the loss or destruction of the court records of the cases in which they were issued they may also become *prima facie* evidence of the rendition and entry of the decrees which authorized them. But it is only in case of the loss or destruction of the record that a deed of this character can be received without other proof. If a party desires to avail himself of the rights which such a deed confers he must not only produce and prove the deed but also the decree of court authorizing the sale, and, generally, the order of confirmation.¹ While the deed may be received as evidence of the regularity of the sale it is not proof of the prior proceedings which led to such sale.²

§ 319. **Purchaser at void judicial sale.**—The law has provided a specific formula for the disposal of lands in pursuance of a judicial decree, and the due observance of this formula is essential to sustain the title of one who purchases at a sale made thereunder.³ These provisions are for the protection of the rights of the persons whose land is thus sold and are usually strictly construed in their favor. But where the purchaser at a judicial sale which afterward is adjudged void has acted in good faith, and the money paid has been applied as directed by the decree, the purchaser will be entitled to be subrogated to the rights of creditors whose debts have thus been paid and the land, in his hands, will be charged with a lien to the extent of the amount he has advanced. In such event possession of the land cannot be recovered from him until he has been reimbursed

¹ Reed v. Ohio, etc. Ry. Co., 126 Ill. 48; Moore v. Frazer, 15 Oreg. 635.

² Fischer v. Eslaman, 68 Ill.

78.

³ Stancill v. Gay, 92 N. C. 462.

for his expenditures, or at least, for so much of same as has been applied to the extinction of debts that were enforceable against the property.⁴ The same principle, it has been held, may also be invoked in case of sales under execution,⁵ but this point does not seem to be well settled and cases to the contrary may be found.⁶

The theory upon which the doctrine of subrogation proceeds is, that it would be unconscionable to permit a claimant to recover the lands in controversy discharged from the burden of the debt for the payment of which they had been sold, and which, in good faith, had been advanced by the purchaser. Therefore, to the extent that such purchaser had relieved the land he should be reimbursed, and to secure this the amount due him should be charged upon the land.⁷

§ 320. *Writ of assistance.*—In connection with the general subject of title derived under judicial sale it seems proper that a brief reference should be made to the nature and functions of the writ of assistance. While the allowance of this writ is to a large extent discretionary, yet it is always granted in a proper case where land has been sold under a decree and the defendant, or some one holding in privity under him, on demand made refuses to surrender possession.⁸ Courts of equity, from the earliest times, seem to have assumed authority to issue this writ where the rights of the parties to the title or possession of land have been fully determined, as a means of enforcing their judgments instead of compelling the successful litigant to resort to an action of ejectment at law to recover possession.

But the weight of authority fully establishes the proposition that the writ can be issued only against parties who have been

⁴ *Bland v. Bowie*, 53 Ala. 152; 505; *McGee v. Wallis*, 57 Miss. 638; *Howard v. North*, 5 Tex. 290. Also *Freeman*, *Void Jud. Sales*, § 52.
⁵ *Consult Scranton v. Ballard*, 64 Ala. 402.
⁶ *Perry v. Adams*, 98 N. C. 167.
⁷ *Stanley v. Sullivan*, 71 Wis. 585; *Langley v. Voll*, 54 Cal. 435; *Barton v. Beatty*, 28 N. J. Eq. 412.

⁸ See *Davis v. Gaines*, 104 U. S. 405; *Short v. Sears*, 93 Ind.

concluded by a decree, and who refuse to let the purchaser at a sale under such decree into possession.⁹ As to strangers to the suit, or those who have acquired possession in such a manner as not to be bound by the estoppel of the decree entered therein, the writ is unavailing,¹⁰ and questions of title cannot be tried on an application therefor.¹¹

§ 321. **Administrator's deeds.**—The ancient authorities furnish us with no information respecting titles based upon a deed by an administrator, for the reason that titles of this kind were unknown to the common law. Both the power to sell and its method of exercise are wholly statutory and the decisions all agree in declaring that the statute must be strictly pursued. An administrator's deed derives its primary validity from the order of court directing a sale of the land in question and where title is asserted under a conveyance of this kind the general rule is that full proof of statutory requirements must be shown.¹²

The basis of a title derived through the deed of an administrator is jurisdiction in the court pronouncing the decree of sale. This does not rest, as is sometimes said, upon the petition for sale or the averments of the pleadings in the proceeding.¹³ The jurisdiction, in cases of this kind at least, is conferred only by the existence of a substantive fact, and it is fundamentally requisite to the exercise of such jurisdiction that there shall be an intestate upon whose property rights the court can act. Administration is never granted upon the estate of a living person, notwithstanding he is supposed to be dead, and any attempt so to do is a nullity.¹⁴ A deed executed under such circumstances conveys no title whatever.¹⁵ It is absolutely

⁹ Howard v. Bond, 42 Mich. 131.

¹⁰ Exum v. Baker, 115 N. C. 242.

¹¹ Barton v. Beatty, 28 N. J. Eq. 412; Stanley v. Sullivan, 71 Wis. 585.

¹² La Plante v. Lee, 83 Ind. 155; Ury v. Houston, 36 Tex. 260; Fell v. Young, 63 Ill. 106; Dawson v. Parham, 47 Ark. 215.

¹³ Thomas v. People, 107 Ill. 517.

¹⁴ Springer v. Shavender, 118 N. C. 33, 54 Am. St. 708; Melia v. Simmons, 45 Wis. 334; Morgan v. Dodge, 44 N. H. 259; Thomas v. People, 107 Ill. 517; Perry v. Railroad Co., 29 Kan. 420; Stevenson v. Superior Court, 62 Cal. 60.

¹⁵ Withers v. Patterson, 27 Ill. 497.

void, both as to the ancestor and his heirs, nor will the latter be estopped from proceeding to recover possession of the land for the reason that they may have been made parties to the proceedings for sale. As the decree, in such a case, is void for want of power in the court by which it was entered, it follows that no estoppel was created and that it may be collaterally attacked in any subsequent proceeding.¹⁶ The question will be further considered in the succeeding paragraph.

But where the court has jurisdiction no mere errors can have any effect upon the sale or the title thereby derived. As for instance, an administrator is authorized to sell only where there are proved debts in excess of the personal estate in his hands. But although there may in fact have been no debts remaining unpaid at the time of sale this circumstance will not render the sale void. A *bona fide* purchaser at such sale, without notice that there were no debts to be paid, will be protected in his purchase and the sale will not be open to attack in a collateral proceeding.¹⁷

§ 322. Administrator's deed of estate of living person.—

An interesting as well as difficult question is presented when we come to consider the validity and effect of a deed made in the due course of administration of the estate of a person supposed to be dead but afterward shown to be alive. The difficulty of the subject is further increased by reason of the conflicting decisions which it has produced. In a number of instances it has been held that letters of administration on the estate of a living person are absolutely void and all acts done under them without effect.¹⁸ This logically follows from the reason that the probate jurisdiction extends only to the settlement of estates of persons who are dead, and the fact of death is absolutely essential to confer the jurisdiction.¹⁹ It is true,

¹⁶ *Springer v. Shavender*, 118 N. C. 33. And see *Wall v. Wall*, 123 Pa. St. 545; *Adams v. Cowles*, 95 Mo. 501.

¹⁷ *Bowen v. Bond*, 80 Ill. 351.

¹⁸ *Thomas v. People*, 107 Ill. 517; *Melia v. Simmons*, 45 Wis. 334; *Devlin v. Commonwealth*, 101 Pa. St. 273; *Morgan v.*

Dodge, 44 N. H. 259; *Duncan v. Stewart*, 25 Ala. 408; *Springer v. Shavender*, 116 N. C. 12.

¹⁹ *Griffith v. Frazier*, 8 Cranch (U. S.), 23; *London v. Railroad Co.*, 88 N. C. 584; *Johnson v. Beazley*, 65 Mo. 250; *Melia v. Simmons*, 45 Wis. 334; *Withers v. Patterson*, 27 Tex. 497.

that the judgments of the probate court have the same conclusive effect as judgments of other courts, and, as a rule, may not be attacked collaterally, but this rule applies only to judgments rendered in the exercise of its jurisdiction and in proceedings authorized by law. Every judgment must depend upon the power of the court to render it and if such power does not exist the judgment is a mere nullity and may be so treated in all other proceedings.²⁰

It does not seem that the doctrines above stated have been controverted or denied until within very recent years. At present, however, there is a marked tendency in some states to depart from the settled rules which have long obtained in respect to the probate jurisdiction, and to introduce new principles which, if carried to their legitimate conclusion, are dangerous in the extreme. The cases in which a denial of the general doctrine is found are based on long and unexplained absence and the application of common-law presumptions of death, and are supported by a line of argument somewhat as follows: Where certain facts are to be proved before a court as a ground for issuing process and there is a total defect of evidence, the process will be void, but where the proof tends to make a proper case for the jurisdiction of the court, even though it may be slight and inconclusive, the process will be valid until set aside in a direct proceeding for that purpose.²¹ In the one case, it is said, the court acts without authority; in the other it only errs in judgment upon a question properly before it for adjudication. Hence, it is contended, when in a proceeding a court is required to ascertain a particular fact, or to appoint persons to act in such proceeding, having particular qualifications or occupying some peculiar relation to the parties or the subject-matter, such acts, when performed, are in the nature of adjudications, which, if erroneous, must be corrected by a direct proceeding for that purpose; if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudication may be.²²

²⁰ *Thomas v. People*, 107 Ill. 517; *Duncan v. Stewart*, 25 Ala. 408.

²¹ *Staples v. Fairchild*, 3 N. Y. 41.

²² *Porter v. Purdy*, 29 N. Y. 106.

Pursuing this line of argument it has been held, that notwithstanding the statute gives the probate court no jurisdiction to administer upon the estate of a living person it yet imposes upon such court the duty of inquiry as to the death of any person upon whose estate letters of administration are applied for, and that this is a judicial inquiry. It is immaterial that the inquiry may be a difficult one; the court must act, and decide the fact of death as best it can from the evidence produced. When the fact has been proved to the satisfaction of the court the letters must issue, and are conclusive evidence of the authority of the administrator until revoked.²³ It is further contended in support of this position that cases must frequently arise where death takes place under circumstances where no living witness can be produced to testify to the fact. Parties disappear suddenly, with no trace of their whereabouts. They are sometimes lost, or supposed to be lost, at sea, or are so long absent from their homes and from communication with their friends as to raise a presumption of death. If the doctrine can be upheld that in such cases there is no power to confer jurisdiction to decide the question as to the death of such persons, then there would be no method existing to dispose absolutely of estates, and the most inextricable confusion in the titles to lands must ensue.²⁴

For some time this doctrine, that a living person may be deprived of his estate by holding him concluded by the decision of a probate court that he is dead, was confined to the courts of New York. But more recently the doctrine has found support in other states and one of the most remarkable decisions upon the subject has been rendered in Washington. In this case it was held that a probate court has jurisdiction to appoint an administrator for the estate of a missing person, if the pro-

²³ *Roderigas v. East River Savings Institution*, 63 N. Y. 460. This is the leading case on this point. But compare the same case in 76 N. Y. 316.

²⁴ *Roderigas v. East River Savings Institution*, 63 N. Y. 460. This case seems to have been generally followed in New

York. See *Lange v. Benedict*, 73 N. Y. 30; *Schluter v. Savings Bank*, 117 N. Y. 129; *O'Conner v. Huggins*, 113 N. Y. 517. But has been strongly criticised in other states and by legal writers. See note by Redfield, 15 Am. L. Reg. 212; Am. L. Rev., vol. 10, p. 787.

ceedings are based upon a sufficient petition and it is satisfactorily proved that such person has not been heard of for more than seven years. In such event the missing person, if he afterwards returns, cannot maintain an action of ejectment against the grantee of the administrator who had purchased a portion of the estate at an administrator's sale for which an order had been duly entered.²⁵

§ 323. **Proof of administrator's deeds.**—An administrator's deed, standing alone, in the absence of statutory provision to the contrary, is not evidence of title. It is but one link in a chain of proceedings and the other connectives must be shown with it whenever it is offered in evidence. But, while it is essential to confer jurisdiction on a court to order a sale of a decedent's lands that there shall be unpaid debts properly chargeable upon said lands, and that there is a deficiency of personal estate, so that it becomes necessary to have recourse to real estate,²⁶ it does not seem that it is necessary to show these facts affirmatively when proving title under an administrator's sale. As a rule, a judicial finding that there are debts and that a sale is necessary is not only sufficient but conclusive evidence of these facts,²⁷ and to prove title under an administrator's deed all that is required to raise a presumption of jurisdiction and that all the requisite antecedent steps were taken is the production of the deed, the order of sale, and the order of confirmation.²⁸ As a further rule, a sale made under a decree finding the jurisdictional facts is not open to collateral attack.²⁹

§ 324. **Guardian's deeds.**—Where title is asserted under a deed from a guardian or conservator the production of such deed together with the order of confirmation is usually all that will be required to establish a *prima facie* case. If the deed is regular in form and correctly recites the authority by which it was issued, and if the sale and conveyance which it purports to

²⁵ Scott v. McNeal, 5 Wash. 309, 34 Am. St. 863.

²⁶ Smith v. Wildman, 178 Pa. St. 245.

²⁷ Cobb v. Garner, 105 Ala. 467; Lyne v. Sanford, 82 Tex.

58; Thornton v. Baker, 15 R. I. 553; Bowen v. Bond, 80 Ill. 351.

²⁸ Price v. Springfield Ass'n, 101 Mo. 107; Moore v. Cottingham, 113 Ala. 148.

²⁹ Sherwood v. Baker, 105 Mo. 472.

evidence has been duly confirmed by a court of competent jurisdiction, this, as a rule, will be sufficient to show a legal devolution of the ward's title to the land. If the court, in its order confirming the guardian's sale of his ward's land, makes a finding that the proceedings have been in all respects regular, and in conformity with law and the decree of sale, it will be presumed that there was proper evidence before it to justify such finding, and the same cannot be successfully assailed in a collateral proceeding.³⁰ In any event such a showing will make a *prima facie* case.

This may be taken as a general rule in those states where a guardian's sale is regarded as a proceeding *in rem*, that is, as a proceeding in behalf of the ward and not adversary to him, and this is the view taken in a majority of the states.³¹ Where this doctrine prevails it is only necessary that the court should have jurisdiction of the subject-matter to make an order sustaining a sale.³² But where the proceeding is regarded as adversary in character, or where it so far partakes of the nature of a personal action as to require notice to the ward, the proof required may be more extended than that above indicated. In some of the states, even those which have declared the proceeding to be *in rem*, a notice of the pendency of the application must be given to the ward and if this is omitted the court acquires no jurisdiction. In such case, the sale, being void for want of jurisdiction, may be attacked collaterally.³³ The subject will be considered in detail in the succeeding paragraph.

§ 325. Continued—Invalid sale of ward's land.—It is fundamental, that where a court possesses only a special and limited jurisdiction the record of its proceedings must show jurisdiction in a particular case,³⁴ while it is a further rule, of general and uniform application, that nothing will be presumed

³⁰ Myers v. McGavock, 39 Neb. 843, 42 Am. St. 627.

³¹ See Mohr v. Manierre, 101 U. S. 417; Scarf v. Aldrich, 97 Cal. 360; Mohr v. Porter, 51 Wis. 487.

³² Spring v. Kane, 86 Ill. 530. The Illinois decisions are con-

flicting, however. See Musgrave v. Conover, 85 Ill. 374.

³³ Consult Musgrave v. Conover, 85 Ill. 374. And see Rankin v. Miller, 43 Iowa, 475; Rule v. Broach, 58 Miss. 552.

³⁴ Smith v. Howard, 86 Me. 203, 41 Am. St. 537; Bank v. Wilcox, 15 R. I. 258.

in favor of the right to divest a ward of his title.³⁵ These rules are of peculiar efficacy when applied to courts exercising the probate jurisdiction, which, as a rule, can assert only such powers as are directly conferred upon them by statute, and such as may be incidentally necessary to the execution of these powers.³⁶ To sustain a title derived under sale by a guardian, whenever its validity is properly brought in question, the initial proceedings, upon which the jurisdiction of the court is based, are most important.³⁷ The petition for leave to sell must allege sufficient facts to give the court power to authorize the sale;³⁸ the statutory requirement with respect to bonds must be strictly complied with;³⁹ it must appear that the guardian took the oath, when an oath is required by statute.⁴⁰ All of these matters are essential,⁴¹ and a conveyance by a guardian of the lands of his ward, even under a license of the probate court, without complying with these requirements, has in numerous instances been declared void and held to vest no title in the grantee.⁴²

§ 326. Continued—Failure to give bonds.—It has always been a cherished doctrine that a ward is a special favorite of the courts, which will always intervene to protect his rights, and, in pursuance of this doctrine, a person who purchases the property of the ward or who seeks to divest him of the title thereto, will not be permitted to say that the ward is estopped or concluded, by the irresponsible acts of some person who assumes to act as his guardian without having first complied with those requirements of law which are designed for the ward's

³⁵ *Root v. McFerrin*, 37 Miss. 17; *Tracy v. Roberts*, 88 Me. 310.

³⁶ *Smith v. Howard*, 86 Me. 203, 41 Am. St. 537; *Buckley v. Superior Court*, 102 Cal. 6, 41 Am. St. 135.

³⁷ Consult *Blackman v. Baumann*, 22 Wis. 611; *Ryder v. Flanders*, 30 Mich. 336; *Babcock v. Cobb*, 11 Minn. 347; *Parker v. Nichols*, 7 Pick. (Mass.) 111.

³⁸ *Tracy v. Roberts*, 88 Me. 310; *Frazier v. Steenrod*, 7 Iowa, 339.

³⁹ *Williams v. Morton*, 38 Me.

47; *Knox v. Jenks*, 7 Mass. 488; *Bachelor v. Korb*, 58 Neb. 122; *Holden v. Curry*, 85 Wis. 504.

⁴⁰ *Cooper v. Sunderland*, 8 Iowa, 114; *Williams v. Ried*, 5 Pick. (Mass.) 480.

⁴¹ *Tracy v. Roberts*, 88 Me. 310.

⁴² See *Gibson v. Roll*, 27 Ill. 88; *Bachelor v. Korb*, 58 Neb. 122; *Weld v. Johnson Mfg. Co.*, 84 Wis. 537; *Rucker v. Dyer*, 44 Miss. 591; *Barnet v. Bull*, 81 Ky. 127.

protection and security.⁴³ It is from this principle that the importance of bonds arises. Provisions for sureties are not directory but mandatory, and failure to give bonds as the law requires will generally render void a sale of the ward's land.⁴⁴

It has been held, however, that although a statute requires a guardian, before making a sale of his ward's property, to give a special bond for the proper application of the proceeds, a sale made without having given such bond is not void if subsequently confirmed by the court.⁴⁵ The failure to give the special bond, it is said, is a mere irregularity not affecting the jurisdiction of the court which ordered the sale, and while the irregularity might be sufficient to render the sale voidable, upon application properly made, it would not, of itself, make the transaction void nor subject it to impeachment in a collateral proceeding.⁴⁶ The decisions, in most instances, turn upon the specific terms or judicial construction of the statute, but where the statute does not in terms or by fair implication render void a sale made without special bond the tendency is to uphold them. If the court had power to order the sale, the failure of the guardian to comply with certain directions, should not, it is said, prejudice the rights acquired by the purchaser, and if wrong is done to the ward he has an ample remedy against the guardian.⁴⁸

§ 327. Continued—Rights of ward.—When a sale by a guardian under a license is invalid for want of compliance with statutory requisites, it is competent for the ward, when he becomes of age, to ratify and affirm the sale, or, he may avoid it within a reasonable time and bring ejectment for the recovery of the lands.⁴⁹ If he affirms the sale he is bound by it,⁵⁰ and

⁴³ *Power v. Lenoir*, 22 Mont. 169.

⁴⁴ *Tracy v. Roberts*, 88 Me. 310, 51 Am. St. 394, 34 Atl. Rep. 68; *Vanderburg v. Williamson*, 52 Miss. 233.

⁴⁵ *Hughes v. Goodale*, 26 Mont. 93, 91 Am. St. 410, 66 Pac. Rep. 702; *Watts v. Cook*, 24 Kan. 278.

⁴⁶ *Hughes v. Goodale*, 26 Mont. 93; *Bunce v. Bunce*, 59 Iowa, 533. And see *Dixey v. Laning*, 49 Pa. St. 143; *Perkins v. Fair-*

field, 11 Mass. 227; *Arrowsmith v. Harmoning*, 42 Ohio St. 254; *Dequindre v. Williams*, 31 Ind. 444.

⁴⁸ *Palmer v. Oakley*, 2 Doug. (Mich.) 433.

⁴⁹ *Kingsley v. Jordan*, 85 Me. 137; *Requa v. Holmes*, 26 N. Y. 338; *Rowe v. Griffiths*, 57 Neb. 488; *Wilkinson v. Filby*, 24 Wis. 441.

⁵⁰ *Williamson v. Woodman*, 73 Me. 163.

such affirmance may be implied from his acts.⁵¹ Thus, where a sale is made in good faith, for the benefit of the ward's estate, and he receives and retains the proceeds arising therefrom after becoming of age, then, if there has been no fraud or mistake, and if there is nothing to repel the presumption that he knew his legal rights, he cannot afterward deny the validity of the sale nor claim the land.⁵² The theory upon which this doctrine proceeds is that of equitable estoppel, but it has repeatedly been held that such estoppel is as legally available in an action at law as in a suit in equity,⁵³ and that it applies to a case of this kind.⁵⁴ In the practical application of the principle there is no distinction between void and voidable sales.⁵⁵

On the other hand, if the guardian makes an unauthorized sale of his ward's land no title passes by his deed,⁵⁶ and the ward, on attaining his majority, may elect to reclaim the land, in whosoever hands it may be.⁵⁷ The fact that the purchaser may have bought in good faith will not avail as a defense, for the rule of *caveat emptor* applies to all purchasers at guardians' sales,⁵⁸ and all purchasers, as well as those claiming under them, are bound to inspect the record and to take notice of all defects of title thereby disclosed.⁵⁹ They must observe, at their peril, the authority of the guardian to make the sale.⁶⁰

§ 328. **Tax deeds.**—It was formerly the rule that, in an action for possession of land by the holder of a tax deed, the burden of proof, as between the owner and such holder, was upon the latter, and he was required to show that all of the provisions of law relating to the proceedings on which his

⁵¹ Deford v. Mercer, 24 Iowa, 118.

⁵² Deford v. Mercer, 24 Iowa, 118; Willmore v. Stetler, 137 Ind. 127; Karns v. Olney, 80 Cal. 90; Schenck v. Sautter, 73 Mo. 46; Booth v. Wiley, 102 Ill. 84; Field v. Doyon, 64 Wis. 560.

⁵³ Kirk v. Hamilton, 102 U. S. 68; Dickerson v. Comm'rs, 6 Ind. 128.

⁵⁴ Tracy v. Roberts, 88 Me. 310.

⁵⁵ Penn v. Heisey, 19 Ill. 295;

Deford v. Mercer, 24 Iowa, 118; Maple v. Kussart, 53 Pa. St. 348.

⁵⁶ Williams v. Morton, 38 Me. 47.

⁵⁷ Smith v. Dibrell, 31 Tex. 239.

⁵⁸ Leuders v. Thomas, 35 Fla. 518; O'Herron v. Gray, 168 Mass. 573.

⁵⁹ Bachelor v. Korb, 58 Neb. 122, 76 Am. St. 70.

⁶⁰ Gwynn v. McCauley, 32 Ark. 97; Leuders v. Thomas, 35 Fla. 518.

claim was based had been strictly complied with. The purchaser at tax sale was said to buy at his peril; his title rested upon the regularity of all of the essential antecedent proceedings and to sustain such title he was required to produce some evidence of every fact the existence of which was necessary to establish his right. The recitals of the deed furnished no aid in this respect and were regarded as no evidence whatever of the truth of the matters recited, and if the purchaser failed to secure and preserve the extrinsic evidence of his rights he was generally without a remedy so far as concerned the possession of the lands.⁶¹ As a consequence tax titles were always viewed with suspicion and accepted with caution. Indeed they were scarcely regarded as titles and in the hands of original purchasers and their assigns were usually employed more for the purpose of a club to harass owners and extort unconscionable interest than as a means for acquiring possessory rights.

But the old rule, in its pristine severity, no longer exists. In all of the states legislation has greatly changed the character of a tax deed and increased its evidentiary value. As a general proposition a tax deed is now *prima facie* evidence of the regularity of all former proceedings, and, as a necessary corollary, the burden of proof has been shifted to the person who assails or opposes the title which such deed assumes to confer.⁶²

At one time a legislative reaction set in and a number of states enacted laws making a tax deed conclusive evidence of title in the grantee. The declared or implied effect of such laws was to preclude the owner of the original title from showing any invalidity of the tax deed, a course which virtually amounted to an unconstitutional confiscation of property.⁶³ This bubble was soon punctured by the courts and the laws

⁶¹ See *Lyon v. Hunt*, 11 Ala. 295; *Keane v. Connovan*, 21 Cal. 291; *Brown v. Wright*, 17 Vt. 97; *Worthing v. Webster*, 45 Me. 270; *Polk v. Rose*, 25 Md. 153; *Jackson v. Shepherd*, 7 Cow. (N. Y.) 88.

⁶² See *Washington v. Hosp*, 43 Kan. 324; *Watson v. Atwood*, 25

Conn. 313; *Milkan v. Patterson*, 91 Ind. 515; *Hardie v. Chrisman*, 60 Miss. 671; *Ewart v. Davis*, 76 Mo. 129; *Johnson v. Elwood*, 53 N. Y. 531; *Lee v. Coal Co.*, 84 Pa. St. 74; *Hurd v. Brisner*, 3 Wash. 1.

⁶³ *Cooley, Taxation*, 298. And see *Davis v. Minge*, 56 Ala. 121;

have ceased to have effect. At most they can apply only to matters of a non-essential character which rest in mere expediency, but the owner of property cannot be precluded from showing the invalidity of the deed by proving the omission of any essential act. As to the performance of these acts, and the facts necessary to constitute them, the deed can only be made *prima facie* evidence.⁶⁴ But this the legislature may do, and a statute which so provides entirely changes the rule as to the burden of proof, throwing it upon the party who assumes to contest the tax deed.⁶⁵

Although the burden of proof may be shifted by a legislative act from the plaintiff to the defendant, yet this is regarded by the courts as a mere regulation of the remedy. The owner may negative the *prima facie* title made by the introduction of a tax deed by showing that his property was not subject to the tax, or that it had been paid; that the land was not assessed; that no taxes were due; that it had been redeemed from the sale; or any other jurisdictional fact.⁶⁶

§ 329. Continued—Defects appearing upon the deed.—A sale of land for the non-payment of taxes differs essentially from every other species of conveyance. The officer making the sale has no title to the property and the title which the purchaser acquires is wholly dependent upon a compliance with statutory direction and authority. While certain of the statutory requirements are merely directory, yet those which are designed as a protection for rights of the land-owner are mandatory, and must be strictly followed.⁶⁷ Hence, if the statute fixes a place of sale, and it appears upon the face of the

White v. Flynn, 23 Ind. 46; Reed v. Thompson, 58 Iowa, 455; Dingey v. Paxton, 60 Miss. 1038.

⁶⁴ Marx v. Hanthorn, 12 Saw. (C. Ct.) 374; Allen v. Armstrong, 16 Iowa, 508; Raley v. Guinn, 76 Mo. 263; Callanan v. Hurley, 93 U. S. 387; Maguiar v. Henry, 84 Ky. 1; Larson v. Dickey, 39 Neb. 463.

⁶⁵ Keely v. Sanders, 99 U. S. 441; Stoudenmire v. Brown, 48 Ala. 699; Sams v. King, 18 Fla.

557; Madland v. Benland, 24 Minn. 372; McPhail v. Burris, 42 Tex. 142; Hart v. Smith, 44 Wis. 213.

⁶⁶ See Larson v. Dickey, 39 Neb. 463; Abbott v. Lindemower, 42 Mo. 162; White v. Flynn, 23 Ind. 46; McCready v. Sexton, 29 Iowa, 356; Moore v. Byrd, 118 N. C. 688.

⁶⁷ Crisman v. Johnson, 23 Colo. 264.

deed that the sale was held at some other place, the deed will be void, as the officer was without authority to sell at such place.⁶⁸ So, too, if the statute provides for a separate sale for each delinquent tract, or permits only adjoining lots owned by the same person to be offered together for a gross sum, a deed which shows a sale *en masse* of widely separated or non-contiguous tracts is wholly void.⁶⁹

§ 330. **Continued—Matters of extrinsic proof.**—As we have seen, a tax deed, according to the principles of the common law, is merely one link in the chain of the grantee's title, its operative character and effect depending upon the regularity of the antecedent proceedings. It creates no presumption that the facts upon which it is based, or which are recited therein, had any existence, and whatever of dignity or value is attached to it as an evidence of title is given by special statutory provisions.⁷⁰

The statute now provides for the substance of a tax deed and, in some states, prescribes its form. In the absence of other or additional legislation the production of the deed in evidence will be sufficient to establish a *prima facie* title. But, in a number of states, there is a further provision to the effect that a purchaser at tax sale, or his assigns, must, before applying for a tax deed, give notice to the owner of the expiration of redemption and other matters, and it is generally held in those states that, in the absence of such notice, the deed is not evidence of title.⁷¹ It has further been held, in the construction of such provisions, that the statutes making a tax deed presumptive evidence of the regularity of prior proceedings refer only to the acts and proceedings required to be done by the public officials intrusted with the various steps leading up to the execution of the deed and not to the things required to be done

⁶⁸ *Crisman v. Johnson*, 23 Colo. 264, 58 Am. St. 224; *Rubey v. Huntsman*, 32 Mo. 501.

⁶⁹ *Emerson v. Shannon*, 23 Cal. 274, 58 Am. St. 232; *Cocks v. Simmons*, 55 Ark. 104; *Hall v. Dodge*, 18 Kan. 279; *Byam v. Cook*, 21 Iowa, 392; *Farnham v. Jones*, 32 Minn. 7.

⁷⁰ *Miller v. Miller*, 96 Cal. 376, 31 Am. St. 229; *Worthing v. Webster*, 45 Me. 270.

⁷¹ See *Wilson v. McKenna*, 52 Ill. 43; *Williams v. Underhill*, 58 Ill. 137; *Miller v. Miller*, 96 Cal. 376.

by the applicant for the deed, and that as to such latter matters extrinsic evidence must be furnished.⁷²

It has been held in some states, where this requirement is imposed, that the deed being *prima facie* evidence of the regularity of all proceedings prior to its execution, it must be presumed, in the absence of a showing to the contrary, that the notice was served upon the person in whose name the land was taxed. Hence, where there is no showing to rebut this presumption, the court will assume that the notice was properly served.⁷³ But such a holding virtually defeats the very purpose for which the law was designed. It permits the holder of the tax deed to rely upon it as evidence of things required to be done by himself; things which are in no way connected with the exercise of the taxing power, and which were intended as a protection to the land owner. Evidently, if the mere production of the deed shall constitute proof of notice, when there was no notice in fact, the provision in question, as has been well said, "constitutes a most dangerous trap, instead of a protection to property owners."⁷⁴

In states where notice is required the fact is usually evidenced by the affidavit of the applicant for the tax deed. It is upon this affidavit that the clerk or other officer issuing the deed acts. If it shows upon its face a strict compliance with the statute the act of the clerk in executing the deed will be lawful; if it does not, such act will be unauthorized and the deed void.⁷⁵ No intendments in aid of it can be indulged. The invalidity of the deed, by reason of non-compliance with the statutory requirements of notice, may always be shown and the proceeding will always be construed strictly.

⁷² *Miller v. Miller*, 96 Cal. 376. And see *Reed v. Thompson*, 56 Iowa, 455; *Van Matre v. Sankey*, 148 Ill. 536.

⁷³ *Soukup v. Investment Co.*, 84 Iowa, 448. But compare *Reed v. Thompson*, 56 Iowa, 455.

⁷⁴ *Reed v. Thompson*, 56 Iowa, 455.

⁷⁵ *Van Matre v. Sankey*, 148 Ill. 536; *Stevens v. Murphy*, 91 Iowa, 356, 51 Am. St. 348.

III. DEEDS BY PERSONS INCOMPETENT AND DISQUALIFIED.

§ 331. Generally considered.	§ 333. Deeds of minors.
332. Deeds of married women.	334. Deeds of lunatics.

§ 331. **Generally considered.**—It is not proposed to enter into an extended discussion respecting persons incompetent or disqualified. Indeed, the limits of this work preclude such a course. Nor is it at all necessary for a proper presentation of the general subject. But there are a few points that have presented themselves in this connection and these points will be briefly considered. It must often happen that deeds will be offered in support of a claim of title, which, while fair upon their face, are yet tainted with some inherent vice growing out of the legal capacity of the makers. A few of the salient features of such deeds will be noticed and commented upon in what follows.

§ 332. **Deeds of married women.**—From the earliest period in the history of the common law, and until very recent years, husband and wife were regarded as constituting but one person for most juristic purposes. The result of this was to place the wife under great disability with respect to her property rights. Her very existence was merged into that of the husband and without him she could do no act looking toward the disposition or alienation of her lands. At the present time the law, in most of the states, has fully emancipated the wife from the ancient thralldom to which she was so long subjected, but this condition came by slow degrees and the changes of the law were never retroactive in their nature. As a consequence the law as it existed at the time a conveyance by a married woman was made must always be resorted to in order to determine the operation and effect of the deed whereby the conveyance was effected.

For many years after a freedom of alienation was conferred on the wife it was yet necessary that the husband join in the act of conveyance, and this disability has not been wholly removed in many of the states. The main idea involved in this procedure seems to have been that of protection for the wife

from improvident dispositions of her lands, and in the great majority of the modern cases, in which questions of title have been decided, it is very uniformly held that formal joinder is not necessary and that any unequivocal act of assent will be sufficient to impart validity to the conveyance.⁷⁶

The question arises most frequently in cases where the granting act is by the wife alone, the husband's assent being indicated only by joining in the execution. As a general proposition, a grantor must be described as such in the body of the deed; the act of grant must purport to be his act; and there must be apt words showing his intention to convey. But this rule, the integrity of which is beyond dispute, does not apply to a deed by a married woman of her separate estate, and not withstanding the statute may in terms prescribe that the conveyance must be made by the "joint deed" of the spouses yet this joinder is sufficiently shown by the husband's signature and seal. In such event the deed will be valid and effective although the husband is not named as a grantor or otherwise mentioned in the body of the deed, and if the deed is duly acknowledged by both husband and wife it may be received in evidence to prove the fact of conveyance.⁷⁷ In a few states opposite views are held and the decisions are to the effect that the husband must express his assent by joining as a grantor. Where this doctrine prevails a deed by the wife alone in which her husband merely participates in the execution would be void, and if offered in evidence must be rejected.⁷⁸

§ 333. *Deeds of minors.*—It has long been a rule of law that a person entering into a contract during his minority shall have the privilege of repudiating same after attaining full age, except in a few exceptional cases. This privilege has been ac-

⁷⁶ *Pease v. Bridge*, 49 Conn. 58; *Thompson v. Lovrein*, 82 Pa. St. 437; *Dentzel v. Waldie*, 30 Cal. 149; *Bray v. Clapp*, 80 Me. 277.

⁷⁷ *Schley v. Pullman Car Co.*, 120 U. S. 575; *Morgan v. Snodgrass*, 49 W. Va. 387; *Roberts v. McIntire*, 84 Me. 362; *Stone v.*

Montgomery, 35 Miss. 107; *Woodward v. Seaver*, 38 N. H. 29; *Peter v. Byrne*, 175 Mo. 233, 75 S. W. Rep. 433, 97 Am. St. 567; *Miller v. Shaw*, 103 Ill. 292; *Pease v. Bridge*, 49 Conn. 58.

⁷⁸ See *Davidson v. Cox*, 112 Ala. 510; *Dietrich v. Hutchinson*, 73 Vt. 134, 50 Atl. Rep. 810, 87 Am. St. 698.

corded because of the supposed indiscretion incident to the immature period of life; and because of the extreme difficulty attending the determination of contractual incapacity, as a matter of fact, an arbitrary age has been fixed upon as the time at which a person shall be held *sui juris*. This age, by the common law, has been fixed at twenty-one years, but, as it is competent for the legislature to vary this limit and to change the time of legal maturity, by statute, in a number of states, a woman is permitted to attain majority at the age of eighteen years. Within these periods the law has refused to draw any lines or make any distinctions. All infants are entitled to the same protection, and a youth who has almost reached his majority is no more bound by his contract than an infant of tender years. Notwithstanding that a minor may be as able, in fact, to protect his interests as a person who has passed the full age period the law will refuse to measure individual capacity and the right of disaffirmance is given to every one who may be able to bring himself within the rule.⁷⁹

Where the contract has been executed by the infant, and has been in whole or in part executed by the adult, and the infant, upon coming of age repudiates the transaction, the general rule is that he must return the consideration received. But the weight of authority is that the rule can apply only where the infant has the consideration at the time he attains full age. If he has wasted or squandered it during his infancy he may disaffirm the contract and recover what he may have given upon it without making any restitution of that which he had received.⁸⁰ We will not stop to discuss the morality of the qualification of the rule. It is enough that it has received a general assent, and seems to be supported by the theory that if the infant were required to restore an equivalent where he has wasted or squandered the consideration received, the privilege of disaffirmance would be of no avail when most needed.⁸¹

⁷⁹ *Baker v. Lovett*, 6 Mass. 78; *McCarty v. Carter*, 49 Ill. 53.

⁸⁰ *Green v. Green*, 69 N. Y. 553; *Chandler v. Simmons*, 97

Mass. 508; *Reynolds v. McCurry*, 100 Ill. 356; *Price v. Furman*, 27 Vt. 268.

⁸¹ *Craig v. Van Bebbler*, 100 Mo. 584, 18 Am. St. 569.

But while the deed of an infant is defeasible, and may be avoided by any proper act of disaffirmance after the attainment of majority, yet in other respects it is not distinguishable from the deed of a person *sui juris*. It carries title of the land with all its incidents and is effective for all purposes until defeated by some unequivocal act of the grantor.⁸² If possession has been delivered under it the grantee is in as of right, and hence cannot, in any just sense, be regarded as a trespasser. This was important under the old practice, in which the action of ejectment necessarily supposed the defendant to be a trespasser. It was then held that, in a case of this kind, the action would not lie without some previous act on the part of the plaintiff which avoided the deed under which the defendant held possession. In other words, that the defendant could not be treated as a trespasser until the grantor, by some act of avoidance, had placed him in that position.⁸³

The theory upon which this doctrine was maintained seems to have been, that the action of ejectment is essentially one of trespass, and that where an individual is in possession of land with permission or acquiescence of the owner, a suit cannot be maintained against him to recover such possession without a notice to quit, or until there has been a demand of possession and refusal, or unless he shall have been guilty of some other act which will make him a wrong-doer.⁸⁴ But this theory, notwithstanding its apparent fairness, has been denied by the later cases. This has resulted, partly from the changes to which the action of ejectment has been subjected and partly from revised opinions of the effect of the act of disaffirmance. The prevailing doctrine now is, that the disaffirmance of an infant's deed not only avoids it is a muniment of present title but renders it without effect from the beginning. Therefore, as the deed becomes wholly inoperative from the time it was delivered it follows that the grantee's possession under it is tor-

⁸² *Logan v. Gardner*, 136 Pa. St. 588, 20 Am. St. 939; *Law v. Long*, 41 Ind. 586; *Ihley v. Padgett*, 27 S. C. 300; *Kell v. Healey*, 84 Ill. 104; *Green v. Wilding*, 59 Iowa, 679; *Hoffert v. Miller*, 86

Ky. 572; *Davis v. Dudley*, 70 Me. 236; *Birch v. Linton*, 78 Va. 584.

⁸³ See *Bool v. Mix*, 17 Wend. (N. Y.) 119; *Wallace's Lessee v. Lewis*, 4 Harr. (Del.) 75.

⁸⁴ *Clawson v. Doe*, 5 Blackf. (Ind.) 300.

tious. For these reasons it is generally held, that no previous act on the part of the grantor is necessary in order to enable him to bring ejectment and that the mere institution of a suit, after attaining his majority, is sufficient in itself to show a disaffirmance and avoid the conveyance.⁸⁵

§ 334. **Deeds of lunatics.**—It would seem that at common law the deed of a lunatic or insane person was void, and this view has been taken by a number of American courts.⁸⁶ But where this view has been permitted to prevail the circumstances of the particular case have had much to do with the shaping of the decision of the court, and generally, under this line of decisions, to establish invalidity it must appear that the grantor at the time of execution was absolutely without capacity to understand or comprehend the nature of the transaction.⁸⁷

The better rule, and that which is sustained by the volume of authority, is that the deed of an insane person whose incompetency has not been judicially determined is not void, but voidable merely,⁸⁸ and is effectual to pass title with all its incidents if unassailed.⁸⁹ Indeed the only question of moment presented for our consideration in connection with our present subject is with respect to the method of testing validity. If the deed is regular in form and execution it conveys the legal title and its effect can be avoided, if at all, only upon equitable grounds and by the introduction of extrinsic proof.⁹⁰ From this it follows that such a deed, in the absence of statutory aid, cannot be avoided in an action of ejectment but resort must be had for

⁸⁵ *Craig v. Van Bebb*, 100 Mo. 584, 18 Am. St. 569; *Hughes v. Watson*, 11 Ohio, 127; *Webb v. Hall*, 35 Me. 336; *Birch v. Linton*, 78 Va. 584; *Cole v. Pennoyer*, 14 Ill. 158.

⁸⁶ See *Rogers v. Walker*, 6 Pa. St. 371; *Van Deusen v. Sweet*, 51 N. Y. 378.

⁸⁷ *Aldrich v. Bailey*, 132 N. Y. 85.

⁸⁸ *Castro v. Gell*, 110 Cal. 292, 52 Am. St. 84; *Moran v. Moran*, 106 Mich. 8, 58 Am. St. 462;

Odom v. Ruddick, 104 N. C. 515; *Pearson v. Cox*, 71 Tex. 246; *Gibbon v. Maxwell*, 34 Kan. 8; *Behrens v. McKenzie*, 23 Iowa, 333.

⁸⁹ *Badger v. Phinney*, 15 Mass. 359; *Nichol v. Thomas*, 53 Ind. 42; *Hovey v. Hobson*, 53 Me. 451; *Elston v. Jasper*, 45 Tex. 409; *Eaton v. Eaton*, 37 N. J. L. 108.

⁹⁰ *Moran v. Moran*, 106 Mich. 8; *Pearson v. Cox*, 71 Tex. 246; *Hovey v. Chase*, 52 Me. 304.

this purpose to a court of equity, where the interests of all parties can be protected.⁹¹

Where the common-law rule which excludes equitable defenses in ejectment has been abrogated, as is the case in a number of states, the doctrine above stated may not apply and the rights of all parties may be determined in this form of action.

V. DEFEASIBLE CONVEYANCES.

§ 335. Deeds upon condition.	§ 337. Creation of conditions.
336. Construction of conditions.	338. Conditions subsequent.
	339. Avoidance of conditions.

§ 335. **Deeds upon condition.**—It is now among the best established rules governing the sale and conveyance of land, that a vendor may annex to his grant any reasonable condition, either with respect to the uses to which the land shall be put or to matters growing out of same, and this rule acquires additional force whenever the vendor has any special and substantial interest in the enforcement of the condition.⁹² Where an estate is conveyed and accepted subject to a condition the burden attends and qualifies the grant, and, if not avoided, the deed must have effect according to its terms.⁹³ About the only limitation of this right is that it shall be exercised reasonably with due regard to public policy, and without creating any unlawful restraint of trade. The particular class of conditions which most effect the right of property in the hands of a grantee, and which most frequently figure in ejectment suits, is that technically known as conditions subsequent; that is, conditions which work a forfeiture of the estate conveyed in case they shall be broken. But a mere breach of condition does not, of itself, divest the estate to which the condition is annexed. At best, it confers only a right of entry or action, and until the grantor has made an entry upon the land, or otherwise unequivocally asserted his intention to take advantage of the

⁹¹ *Moran v. Moran*, 106 Mich. 8. 100 U. S. 55. Compare *Barrie v. Smith*, 47 Mich. 130.
⁹² *Plumb v. Tubbs*, 41 N. Y. 442; *Smith v. Barrie*, 56 Mich. 314; *O'Brien v. Wetherell*, 14 Kan. 616; *Cowell v. Springs Co.*,
⁹³ *Sioux City, etc. R. R. Co. v. Singer*, 49 Minn. 301.

forfeiture, the estate with its attendant qualities remains in the grantee.⁹⁴

§ 336. **Construction of conditions.**—It is well established that conditions, and particularly conditions subsequent, or such as will defeat an estate once vested, are not favored in law. They can be created only by express terms or clear and necessary implication, and courts are always inclined to construe them as covenants rather than conditions whenever this can reasonably be done.⁹⁵ In every case, if it be doubtful whether a clause imports a condition or a covenant the latter construction will be adopted, and it has been held that even though apt words for the creation of a condition are employed, yet, if there is no express provision for re-entry or forfeiture, the court will look to the nature of the acts to be performed or prohibited and from the relative situation of the parties and a consideration of all the circumstances attending the execution of the deed, will determine the effect of the instrument and the real intention of the parties.⁹⁶

In all cases conditions in avoidance of an estate should be construed strictly as against the grantor.⁹⁷ and with liberal intendment as regards the grantee,⁹⁸ and in no case should they be extended beyond the precise terms in which they are expressed.⁹⁹ No rule perhaps, is better settled than that a party who insists upon the forfeiture of an estate under a condition of his own creation must bring himself clearly within the letter.¹

§ 337. **Creation of conditions.**—There seems to be a marked distinction, with respect to what language is required

⁹⁴ *Lewis v. Lewis*, 74 Conn. 630, 92 Am. St. 240, 51 Atl. Rep. 854; *Robinson v. Ingram*, 126 N. C. 327; *Guild v. Richards*, 82 Mass. (16 Gray) 309; *Osgood v. Abbott*, 58 Me. 73; *Spect v. Gregg*, 51 Cal. 198.

⁹⁵ *Board of Education v. Trustees*, 63 Ill. 204; *Hoyt v. Kimball*, 49 N. H. 322.

⁹⁶ *Post v. Well*, 115 N. Y. 361; *Hoyt v. Kimball*, 49 N. H. 327; *City Mission v. Appleton*, 117 Mass. 326; *Raley v. Umatilla*

County, 15 Oreg. 172; *Peden v. Railway Co.*, 73 Iowa, 328.

⁹⁷ *Gadberry v. Sheppard*, 27 Miss. 203; *Moore v. Pitts*, 53 N. Y. 85.

⁹⁸ *Palmer v. Ford*, 70 Ill. 369; *Woodworth v. Payne*, 74 N. Y. 196; *Glenn v. Davis*, 35 Md. 208.

⁹⁹ *Emerson v. Simpson*, 43 N. H. 473; *Voris v. Renshaw*, 49 Ill. 425.

¹ *Jackson v. Silvermail*, 15 Johns. (N. Y.) 278; *Page v. Palmer*, 48 N. H. 385; *Weir v. Simons*, 55 Wis. 637.

to create an estate on condition, between conveyances purely voluntary and those based upon a valuable consideration. In the former case such an estate may be created by any words which declare that the land is given for a certain purpose or with a particular intention;² in the latter, unless these words are conjoined with others giving a right to re-enter or declaring a forfeiture in a specified contingency, the grant will not be deemed conditional.³

The formula "provided always," etc., is generally employed in the draughting of instruments intended to be conditional in character, and the terms "provided always," and "upon the express condition," etc., have frequently been held to create estates upon condition.⁴ But this effect of the formula may easily be negated by other parts of the instrument, and when it is clear that the words have been employed to express ideas different from their technical signification courts will generally construe them according to such intent.⁵

§ 338. **Conditions subsequent.**—Ejectment is frequently resorted to for the purpose of recovering the possession of land claimed under a forfeiture arising from the breach of a condition subsequent. In all such cases, however, the claimant must show a clear and indisputable right of re-entry. It is fundamental that conditions subsequent working forfeiture are not favored in law;⁶ that they will always be strictly construed;⁷ and that in all cases of doubt and uncertainty, where the intention is not clearly manifested, they will be interpreted only as covenants or restrictive stipulations.⁸ The mere fact that land is conveyed with a restriction upon the uses to which

² *Ecroyd v. Coggeshall*, 21 R. I. 1, 79 Am. St. 741, 41 Atl. Rep. 260.

³ *Rawson v. School District*, 7 Allen (Mass.), 125; *Brown v. Caldwell*, 23 W. Va. 187; *Faith v. Bowles*, 86 Md. 13;

⁴ *Wiggins Ferry Co. v. Railway Co.*, 94 Ill. 83.

⁵ *Railroad Co. v. Beal*, 47 Cal. 151; *Hoyt v. Kimball*, 49 N. H. 322; *Callins v. Lavalley*, 44 Vt. 230.

⁶ *Kilpatrick v. Baltimore*, 81 Md. 179; *Hoyt v. Kimball*, 49 N. H. 322; *Horner v. Railway Co.*, 38 Wis. 165; *Scovill v. McMahon*, 62 Conn. 378.

⁷ *Faith v. Bowles*, 86 Md. 13; *Peden v. Railway Co.*, 73 Iowa, 328; *Page v. Palmer*, 48 N. H. 385; *Rawson v. School District*, 7 Allen (Mass.), 125; *Sohler v. Church*, 109 Mass. 1.

⁸ *Graves v. Deterling*, 120 N. Y. 447; *Boone v. Clark*, 129 Ill.

it may be applied, or a limitation of the manner of its enjoyment, will not have the effect of creating a condition subsequent,⁹ nor will a diversion from prescribed uses subject the title of the grantee to divestiture.¹⁰ It will often happen that a grant is made for a special purpose and with a proviso annexed that the land shall not be used for any other than the one specified, but such a grant, without more, is not to be deemed conditional.¹¹ At most, it would seem that such a grant would have the effect to create only a confidence or trust in connection with the land conveyed or to raise an implied agreement on the part of the grantee to use the land only for the purpose specified.¹²

While no technical words are necessary to create a condition,¹³ and while the intention of the parties is the controlling factor,¹⁴ yet this intention must be unequivocally manifested by apt and sufficient language, which, in itself, imports that the continuance of the estate is dependent upon the supposed condition.¹⁵ Probably nothing more unmistakably indicates the character of the grant or discloses the intentions of the parties thereto, than the insertion of words of forfeiture or provisions for re-entry,¹⁶ and while it is not essential to a condition subsequent that there shall be an express reservation of the right of re-entry or a proviso that the estate granted shall revert upon a breach of the condition,¹⁷ yet there must be some words which

466; *Peden v. Railway Co.*, 73 Iowa, 328; *Chicago, etc. Ry. Co. v. Titterton*, 84 Tex. 218, 31 Am. St. 39, 19 S. W. Rep. 472; *Thornton v. Trammell*, 39 Ga. 202.

⁹ *Faith v. Bowles*, 86 Md. 13, 63 Am. St. 489, 37 Atl. Rep. 711; *Newpoint Lodge v. Newpoint*, 138 Ind. 141, 37 N. E. Rep. 650.

¹⁰ *Ecroyd v. Coggeshall*, 21 R. I. 1, 79 Am. St. 741, 41 Atl. Rep. 260.

¹¹ *Farnham v. Thompson*, 34 Minn. 331, 26 N. W. Rep. 9; *Episcopal Mission v. Appleton*, 117 Mass. 326; *Curtis v. Board of Education*, 43 Kan. 138.

¹² *Greene v. O'Connor*, 18 R.

I. 56, 25 Atl. Rep. 692; *Packard v. Ames*, 16 Gray (Mass.), 327.

¹³ *Gilbert v. Peteler*, 38 N. Y. 165.

¹⁴ *Star Brewery Co. v. Primas*, 163 Ill. 652; *Chapin v. School District*, 35 N. H. 445; *Horner v. Railway Co.*, 38 Wis. 165.

¹⁵ *Laberee v. Carleton*, 53 Me. 211; *Rawson v. School District*, 7 Allen (Mass.), 125; *Craig v. Wells*, 11 N. Y. 315.

¹⁶ *O'Brien v. Wagner*, 94 Mo. 93; *Gilbert v. Peteler*, 38 N. Y. 165; *Emerson v. Simpson*, 43 N. H. 475.

¹⁷ *Horner v. Railway Co.*, 38 Wis. 165.

clearly indicate that the estate or interest is to depend upon a contingency provided for.¹⁸ When this fact is unequivocally shown the particular form of words used is immaterial, for a forfeiture follows a condition subsequent upon its breach by operation of law.¹⁹

§ 339. **Avoidance of conditions.**—The general rule is, that an estate which has once vested cannot be defeated by a condition subsequent which is impossible, illegal, or repugnant to the estate granted.²⁰ In such event the condition is discharged and the title of the grantee freed therefrom.²¹ The right of entry may be waived by the grantor,²² or it may be lost by his own laches and neglect,²³ and where a right of re-entry has not been exercised for many years after such right accrued the grantor and his heirs may be held to have waived the same.²⁴

¹⁸ Lyon v. Hersey, 103 N. Y. 264.

¹⁹ Jackson v. Allen, 3 Cow. (N. Y.) 220; Osgood v. Abbott, 58 Me. 73.

²⁰ Ricketts v. Railway Co., 91 Ky. 221; Taylor v. Sutton, 15 Ga. 103; Scovill v. McMahon, 62 Conn. 378, 36 Am. St. 350; St. Louis, etc. Co. v. Mathers, 71 Ill. 592.

²¹ Scovill v. McMahon, 62 Conn. 378, 36 Am. St. 350.

²² O'Brien v. Wagner, 94 Mo. 93; Benavides v. Hunt, 79 Tex. 383; St. Louis, etc. Co. v. Mathers, 71 Ill. 592.

²³ Guild v. Richards, 16 Gray (Mass.), 309; Andrews v. Senter, 32 Me. 394.

²⁴ M. & C. R. R. Co. v. Neighbors, 51 Miss. 412; Guild v. Richards, 82 Mass. 309.

CHAPTER X.

TITLE BY DEVISE.

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| § 340. Generally considered. | § 353. Description of devisee. |
| 341. Methods of proof. | 354. Definition of terms— |
| 342. Effect of probate of wills. | Issue. |
| 343. Continued—Foreign probate. | 355. Continued—Children. |
| 344. Lost wills. | 356. Continued—Heirs. |
| 345. Establishment of title. | 357. Illegitimates. |
| 346. Construction of wills. | 358. Adoptive heirs. |
| 347. Continued — Underlying principles. | 359. Description of land devised. |
| 348. Continued — As affected by extrinsic facts. | 360. Erroneous description — The rule stated. |
| 349. General and particular intent. | 361. Continued — Qualifications of the rule. |
| 350. The rule in Shelley's Case. | 362. Devise upon condition. |
| 351. Repugnancy. | 363. Devise of power of disposition. |
| 352. Devise of same tract to different persons. | 364. Devise by joint tenant. |
| | 365. Void devise. |

§ 340. **Generally considered.**—Title by *devise*, or, as it is sometimes called, *testamentary succession*, is that form of purchase whereby the instrument or act of transfer becomes effective only at the death of the grantor. This is the test usually employed to determine the operative character of an instrument of conveyance and which distinguishes deeds from wills, whatever may be the form of the instrument. Where the claimant bases his rights on a will the methods of proof are essentially different from those employed where the grant is *in presenti*, and much technical difficulty is sometimes encountered.

§ 341. **Methods of proof.**—In the English works upon the subject of ejectment, as well as in the writings of the earlier American commentators, much space is devoted to the methods of proof by which a devisee must establish his title,

where his entry is resisted by an heir or other adverse claimant. Under the English common law relating to ancient documents and deeds of conveyance, if the will was thirty years old it might be introduced and read without further proof,²⁵ otherwise its due execution was required to be shown together with such other facts as were essential to its validity. It will be remembered, however, that in England, until very recent years, there were no courts vested with general powers to take the proof of wills and to certify thereto. The ecclesiastical courts had a limited jurisdiction with respect to wills of personalty, or testaments, but this authority did not extend to wills disposing of lands, or real property, and even though such a will was admitted to probate in an ecclesiastical court, which was often the case when it contained provisions relating both to real and personal estate, the decree entered thereon was operative only with respect to the personalty, and so far as it affected the lands, could not be given in evidence in the secular courts. There being no provision for the probate of wills of real property they were cognizable only in the courts of common law and in the ordinary forms of legal actions, and whenever a question arose concerning them in any court or legal proceeding it became necessary to establish them by proof of their due execution and publication. In a number of instances American writers have copied or followed the *dicta* of the English books, and the result has been to create considerable confusion upon this branch of the subject.

The law relating to the estates of decedents as administered in the United States, is very definite in its provisions respecting the probate of wills. In all of the states statutory courts now exist with exclusive original jurisdiction of all matters relating to the proof of last wills and testaments, whether relating to real or personal property or both. The order of such a court admitting a will to probate establishes its validity, while the findings, judgments and decrees of such courts upon all matters relating to testamentary capacity, execution and publication, are final and conclusive in all other courts where the will may

²⁵ See Adams, Ejectment, 259. as a rule. 2 Green. Ev. § 310. Greenleaf also lays this down

be incidentally drawn in question.²⁶ Where a will has thus been proved it has the effect and operation of a valid conveyance in law of the lands therein devised. In such event no other or further evidence is required, in a collateral proceeding, to show that the instrument offered is the last will and testament of the deceased person whose testamentary act it purports to be. On the other hand, a will that has not been so admitted to probate, though admissible, perhaps, in connection with proof of adverse possession, is not evidence of title in a court of law,²⁷ and, without more, will not sustain an action of ejectment.²⁸

§ 342. Effect of probate of wills.—The probate of a will, if decreed by a court of competent jurisdiction, establishes the facts: (1) that the instrument in question is the last will of the testator and that it was duly executed and published with all the solemnities required by law; (2) that the testator at the time of executing the instrument was of sound and disposing mind and memory, capable of understanding the act he was doing, and the relation in which he stood to the object of his bounty, and to the persons to whom the law would have given his property if he had died intestate; (3) that the instrument was executed without fear, fraud or undue influence by which his own intentions were controlled and supplanted by those of another; (4) that he executed the instrument *animo testandi*, with an understanding and purpose that it should be his last will and testament;²⁹ and (5) it is presumptive evidence of the death of the person whose will it purports to establish.³⁰ Such decree is generally regarded as in the nature of a judgment *in*

²⁶ *Re Donnelly's Will*, 68 Iowa, 126; *Howbert v. Heyle*, 47 Kan. 48; *Böwen v. Allen*, 113 Ill. 57; *Loring v. Arnold*, 14 R. I. 430; *Dilworth v. Rice*, 48 Mo. 133; *Caulfield v. Sullivan*, 85 N. Y. 160; *Matthews v. McDade*, 72 Ala. 377.

²⁷ *Willamette, etc. Co. v. Gordon*, 6 Oreg. 175; *Wood v. Mathews*, 53 Ala. 1; *Pitts v. Melser*, 72 Ind. 469; *Shumway v. Holbrook*, 1 Pick. 114; *Ochoa v. Mil-*

ler, 59 Tex. 460; *Pettit v. Black*, 13 Neb. 142; *Graves v. Ewart*, 99 Mo. 13, 11 S. W. Rep. 971.

²⁸ *Snuffer v. Howerton*, 124 Mo. 637.

²⁹ *Barker v. Comins*, 110 Mass. 477; *Matthews v. McDade*, 72 Ala. 377; *Greenwood v. Murray*, 26 Minn. 259; *Re Donnelly's Will*, 68 Iowa, 126.

³⁰ *Carroll v. Carroll*, 6 Thomp. & C. (N. Y.) 294; *Belden v. Meeker*, 47 N. Y. 307.

rem,³¹ and in the absence of statutory provisions is conclusive as against all the world as to the validity of the will,³² and affirms the title of the beneficiary under it from the time of the testator's death,³³ relating back so as to make valid whatever had been previously done, which, under the will, after probate, the beneficiary could lawfully have done.³⁴

But though probate establishes the sufficiency of the will, and confirms the claims of those holding under it, so far as to make it evidence of title, it does not determine the title to the property, nor establish the validity of any devise given by it, the will having no greater effect after probate than any other legal conveyance.³⁵

A transcript of the record of probate of a will devising lands is always competent evidence of title in an action of ejectment, and will, of itself, be sufficient to establish title, if not overcome by counter proof.³⁶

§ 343. **Continued—Foreign probate.**—In order to entitle a devisee of lands under a will probated in a foreign jurisdiction to deduce legal title to same in the courts of the state where the land is located, it is necessary, as a rule, that the will be also probated in the local courts. This matter is governed by statute, which generally provides that the copy of the will presented must be accompanied by the foreign probate and due authentication thereof, these together constituting the one instrument or subject-matter to be acted upon under the statute; and all are, as a rule, essential to authorize the probate court to exercise jurisdiction.³⁷ Whenever this ancillary probate is resorted to it is generally allowed as a matter of course

³¹ Hall v. Hall, 47 Ala. 290; Crippen v. Dexter, 13 Gray (Mass.), 330; State v. McGlynn, 20 Cal. 233; Wolcott v. Wolcott, 140 Mass. 194; Brock v. Frank, 51 Ala. 85.

³² Brock v. Frank, 51 Ala. 85; Janes v. Williams, 31 Ark. 175; Tucker v. Whitehead, 58 Miss. 762; In re Williams, 1 Lea (Tenn.), 529; Orr v. O'Brien, 55 Tex. 149.

³³ Stuphen v. Ellis, 35 Mich. 446.

³⁴ Stuphen v. Ellis, 35 Mich. 446; Allaire v. Allaire, 37 N. J. L. 312; Dublin v. Chadbourn, 16 Mass. 433; Sweet v. Chase, 2 N. Y. 73.

³⁵ Fallon v. Chidester, 46 Iowa, 588; Greenwood v. Murray, 26 Minn. 259; Ware v. Wisner, 4 McCrary (C. Ct.), 66.

³⁶ Allaire v. Allaire, 37 N. J. L. 312.

³⁷ Pope v. Cutler, 34 Mich. 150; Ward v. Oates, 43 Ala. 515.

and without inquiring into the validity of the will or the sufficiency of proofs upon which the court granting the original probate acted, provided such original probate was granted by a court of competent jurisdiction and is properly authenticated.³⁸

As a general rule, in order that a will probated in one state may have effect in the disposition of lands located in another state, it must be shown that its execution conforms to the law of the place where such land is situated,³⁹ and its validity may be contested, with respect both as to execution and proof, if it is not in compliance with the laws of such latter state.⁴⁰ But, usually, where ancillary probate is had in the state where the land is situated, and the court, from the evidence, finds that the authentication of the foreign probate is sufficient, its adjudication cannot be collaterally attacked,⁴¹ and the will, for most purposes, stands on the same footing as a domestic will.⁴² There is some conflict in the decided cases, but the foregoing expresses the generally observed rule.

On the other hand, it would seem that a decree of probate from another state is without effect as to land until it shall have been admitted to record in the state where such land is situated.⁴³ This does not always mean ancillary probate, however, as in some states special provision is made for recording

³⁸ Brock v. Frank, 51 Ala. 89; Apperson v. Bolton, 29 Ark. 418; Newman v. Willets, 52 Ill. 98; Russell v. Hart, 87 N. Y. 19; Markwell v. Thorne, 28 Wis. 548; Whalen v. Nisbet, 95 Ky. 464, 26 S. W. Rep. 188; Crusoe v. Butler, 36 Miss. 150.

³⁹ Key v. Harlan, 52 Ga. 476; Jones v. Robinson, 17 Ohio St. 171; Goodman v. Winter, 64 Ala. 410; Holman v. Hopkins, 27 Tex. 38; Evansville, etc. Co. v. Winsor, 148 Ind. 682, 48 N. E. Rep. 592; Crolley v. Clark, 20 Fla. 849; Dupoyster v. Gaganl, 84 Ky. 403, 1 S. W. Rep. 652.

⁴⁰ Lynch v. Miller, 54 Iowa, 516, 6 N. W. Rep. 740.

⁴¹ Calloway v. Cooley, 50 Kan.

743, 32 Pac. Rep. 372; Crusoe v. Butler, 36 Miss. 150; Goodman v. Winter, 64 Ala. 410; Townsend v. Downer, 32 Vt. 183; Dickey v. Vann, 81 Ala. 425, 8 So. Rep. 195.

⁴² Lyon v. Ogden, 85 Me. 374, 27 Atl. 258; Sims v. Hodges, 65 Miss. 211, 3 So. Rep. 457; Putnam v. Pitney, 45 Minn. 242, 11 L. R. A. 41; Hayes v. Lienloken, 48 Wis. 509, 4 N. W. Rep. 584.

⁴³ Pott v. Pennington, 16 Minn. 509; Apperson v. Bolton, 29 Ark. 418; Slayton v. Singleton, 72 Tex. 209, 9 S. W. Rep. 876; Walton v. Hall, 66 Vt. 455, 29 Atl. Rep. 803; McCormick v. Sullivant, 10 Wheat. (U. S.) 192, L. ed. 300.

an exemplified copy in the registry of deeds, and where this is permitted the will is given the same effect and stands much upon the same footing as a deed, or other form of conveyance. But, in many states, ancillary probate is required and where this rule prevails a will has no effect until proved and allowed in conformity with local law and usage.⁴⁴

§ 344. *Lost wills.*—Much that has been said with respect to lost deeds will apply to testamentary conveyances as well, and the reader is referred to the remarks heretofore made under that head.⁴⁵ Under the system of probate which is employed in the United States it is generally customary, where a will has been proved and received, to make a record thereof in the court granting the letters testamentary. This record, in case of the loss or destruction of the will, will be received in evidence in other courts and generally an exemplified copy, rather than the instrument itself, is the method whereby a devisee establishes title when the same is in dispute. Where the record of a will and its probate have been destroyed by fire or other casualty, copies thereof duly authenticated as provided by law are always admissible to prove the contents of a will and its probate.⁴⁶ Where no other evidence can be furnished oral testimony may be resorted to, but when this is permitted much strictness should be observed. If the will had not been admitted to probate no testimony concerning it should be received.

§ 345. *Establishment of title.*—In addition to the facts of due execution, publication and testamentary capacity, it was formerly the rule, in case of a claim of title by devise, for the devisee to prove, in the first instance, the lawful seizin of the testator. But this, as has been shown, is no longer necessary, for seizin, in its strictly legal and original signification, has ceased to be a requisite on which to found a claim of title or a right to possession. As a general statement, it is sufficient to produce the will properly authenticated, and establish the identity of the parties, and, if the devise under which the claim is made be of a remainder, or a reversion, to show the deter-

⁴⁴ Pott v. Pennington, 16 Minn. 509.

⁴⁶ Larsen v. Johnson, 78 Wis. 300.

⁴⁵ § 305.

mination of the precedent estates. If the devise is made upon a condition precedent it will further be necessary to show performance of the condition. Of course, it will be necessary to show the devisor's title as part of the claimant's proof, but, a *prima facie* case is made out when it is shown that the devisor was in possession of the lands at the time of his death or was receiving the rents and profits thereof.⁴⁷ Where more extended proof is necessary a regular devolution of title must be shown from the root, or the common source when both parties claim under the same right, and the methods of proof would be the same as indicated in other parts of this work. In the present chapter, however, no more will be attempted than to show the steps necessary to prove title as devisor and the effect of a will as a conveyance.

§ 346. **Construction of wills.**—Inasmuch as the establishment of a will now lies within the province of the probate court, and of those courts of equity jurisdiction wherein contests are permitted, it follows that questions relative to testamentary capacity, execution and publication, can seldom arise in suits at law brought for the recovery of the possession of the lands therein devised. But the probate of a will establishes only one general fact, to wit: that the writing in question is the last will of the person whose testamentary act it purports to be. The legal effect of the writing and its capacity as a conveyance are still open to inquiry and when questions of this kind arise, either at law or in equity, they are determined by the application of what are known as "rules of construction." These rules, in the main, have been formulated by courts of equity and it is customary to speak of them as equitable rules, but this is only a conventional usage which comes from the fact that questions of this kind more often arise in courts of equity than in courts of law, or, with greater exactness, in proceedings of an equitable character as distinguished from those usually denominated legal. But there are no rules for the construction of wills adopted by courts of equity that are not equally applicable, where the same question arises, in a court of law.

It is not proposed to present an elaborate classification of these rules nor to enter into diffuse and minute discussions of

⁴⁷ Jones v. Bland, 116 Pa. 190.

their character and methods of application, the reader desirous of exhaustive investigation being referred to the many excellent treatises upon the law of wills that are now at his command. But, in a work treating upon the subject of contested titles, some mention of the methods by which questions arising out of titles claimed by devise are to be settled and determined seems not only proper but necessary, and, in the paragraphs immediately following, the salient features of testamentary construction will be briefly considered.

§ 347. **Continued—Underlying principles.**—To the student who has wrestled with the apparently contradictory phases of our subject, as the same are disclosed in the almost numberless decisions that have been made, it would seem at first view that no branch of the law is involved in more obscurity or subject to more uncertainty, yet, on closer investigation, we may discern a number of well defined and clearly enunciated principles. The first and most important is, that the intention of the testator must, if possible, be carried into effect,⁴⁸ and this intention, it is said, is the pole star that must guide the efforts of court and counsel. If the intent is clear, and is not opposed to any rule of law or contrary to public policy, it must prevail,⁴⁹ and whenever the testator's meaning seems doubtful it may be collected from the scope of the whole will compared with its several parts.⁵⁰ Indeed, no rule is better settled than that the whole will must be considered and so construed as to give effect, if possible, to every part.⁵¹

⁴⁸ *Smith v. Bell*, 31 U. S. 68; *McLean v. Freeman*, 70 N. Y. 88; *Greenough v. Cass*, 64 N. H. 326; *Middleswarth v. Blackmore*, 74 Pa. St. 414; *Banta v. Boyd*, 87 Ill. 118; *Allen v. Craft*, 109 Ind. 476; *Welch v. Huse*, 49 Cal. 506; *Noe v. Kern*, 93 Mo. 367.

⁴⁹ *Williams v. Lodge*, 38 La. Ann. 620; *Reck's Appeal*, 78 Pa. St. 432; *Decker v. Decker*, 121 Ill. 341; *McKelvey v. McKelvey*, 43 Ohio St. 213; *McCray v. Lipp*, 35 Ind. 116; *Waters v. Bishop*, 122 Ind. 516; *Griscom v. Evens*, 40 N. J. L. 402.

⁵⁰ *Ricker v. Cromwell*, 113 N. Y. 115; *Thomas v. Thomas*, 67 Ind. 576; *Suydam v. Thayer*, 94 Mo. 49; *Clark v. Hornthal*, 47 Miss. 499; *McDevitt's Appeal*, 113 Pa. St. 103; *Den v. McMurtree*, 15 N. J. L. 287.

⁵¹ *Smith v. Bell*, 31 U. S. 68; *Suydam v. Thayer*, 94 Mo. 49; *Walker v. Pritchard*, 121 Ill. 221; *Sager v. Galloway*, 113 Pa. St. 500; *Hartnett v. Wandell*, 60 N. Y. 346; *Wiggin v. Perkins*, 64 N. H. 36; *Goddard v. Whitney*, 140 Mass. 92.

No formal or technical words are necessary for any species of disposition,⁵² and although technical words which have a well-defined legal meaning will be given their legal effect,⁵³ in the absence of explanation on the face of the will,⁵⁴ yet, where it is apparent that such words are not employed in their ordinary legal sense, such interpretation should be given them as will best serve to carry out the testator's manifest intention.⁵⁵ It is a further principle in the construction of wills, that the widest latitude may be given to unartificial expressions and an almost unlimited indulgence may be shown to the ignorance and unskillfulness of scriveners.⁵⁶

As a testator is presumed to have used words in their ordinary sense or meaning,⁵⁷ so in the construction of a will the words employed should be given their natural and legal import,⁵⁸ but their more grammatical or ordinary sense is not to be adhered to if it would be repugnant to or inconsistent with the general scope of the instrument.⁵⁹ It must be remembered, however, that the vital question presented in the expounding of a will is, not what the testator may have meant, but what is the meaning of his words,⁶⁰ and while it is true that the intention of the testator must control, it is the intention as he has expressed it in the words he has seen fit to employ.⁶¹ There-

⁵² *Bodwell v. Dickerman*, 63 N. H. 282; *Skinner v. Harrison*, 116 Ind. 139; *Albert v. Albert*, 68 Md. 352; *Jourolmon v. Massengill*, 86 Tenn. 81.

⁵³ *Allen v. Craft*, 100 Ind. 476; *Wylie v. Lockwood*, 86 N. Y. 301; *Felt v. Vanatta*, 21 N. J. Eq. 85; *Lambert v. Paine*, 3 Cranch (U. S.), 97; *Hawley v. Northampton*, 8 Mass. 3.

⁵⁴ *Luce v. Dunham*, 69 N. Y. 39.

⁵⁵ *Gambrill v. Lodge*, 66 Md. 17; *Jourolmon v. Massengill*, 86 Tenn. 81; *Skinner v. Harrison*, 116 Ind. 139; *Palmer v. Horn*, 84 N. Y. 521; *Irvin's Appeal*, 106 Pa. St. 176.

⁵⁶ *Weeks v. Cornwell*, 104 N. Y. 325.

⁵⁷ *Re Woodward*, 117 N. Y. 522, 7 L. R. A. 367; *Williamson v. Williamson*, 18 B. Mon. (Ky.) 329; *Dodge's Appeal*, 106 Pa. St. 220.

⁵⁸ *Wylie v. Lockwood*, 86 N. Y. 301; *Ide v. Ide*, 5 Mass. 500; *Leathers v. Gray*, 101 N. C. 162, 9 Am. St. 30; *Sims v. Conger*, 39 Miss. 231.

⁵⁹ *Boston Safe Deposit Co. v. Coffin*, 152 Mass. 95, 8 L. R. A. 740; *Williams v. Lodge*, 38 La. Ann. 620; *Giles v. Little*, 104 U. S. 291.

⁶⁰ *Bates v. Woodruff*, 123 Ill. 205; *Griscom v. Evens*, 40 N. J. L. 402; *Stokes v. Van Wyck*, 83 Va. 724.

⁶¹ *Bingel v. Voltz*, 142 Ill. 214;

fore, when doubts arise they should be resolved in favor of the testator's having said exactly what he meant.⁶²

§ 348. Continued—As affected by extrinsic facts.—Parol evidence is never admissible to supply, contradict, enlarge or vary the words of a will,⁶³ nor to explain anything to which no reference is made upon its face,⁶⁴ nor to supply the testator's intention.⁶⁵ In every case a will must be construed by its own terms,⁶⁶ and the testator's intention must be gathered from the instrument itself.⁶⁷ But the court, in a proper case, may be aided by extrinsic circumstances surrounding its execution,⁶⁸ and, for the purpose of arriving at a correct conclusion, may consider the situation of the testator with respect to his family, his beneficiaries, and the subject-matter of the devise.⁶⁹

On the other hand, courts have no right to make wills for testators, nor is their meaning to be ascertained by mere conjecture as to what may have been intended. If there is any ambiguity appearing on the face of the will the court may place itself, as far as may be, in the situation of the testator and read the instrument in the light of surrounding circumstances; but, if the intention of the will, as disclosed by its terms, is

Heldenheimer v. Bauman, 84 Tex. 174; *Leathers v. Gray*, 101 N. C. 162. *Gilmor's Estate*, 154 Pa. St. 523, 35 Am. St. 855.

⁶² *Cody v. Bunn*, 46 N. J. Eq. 181; *Ehrman v. Hoskins*, 67 Miss. 192, 19 Am. St. 297; *Sturgis v. Work*, 122 Md. 134, 17 Am. St. 349; *Larmour v. Rich*, 71 Md. 369; *Clift v. Moses*, 116 N. Y. 144; *Waldron v. Waldron*, 45 Mich. 350; *Smith v. Usher*, 108 Ga. 233, 33 S. E. Rep. 876.

⁶³ *Bingel v. Voltz*, 142 Ill. 214, 34 Am. St. 64; *Kurtz v. Hibner*, 55 Ill. 514; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674. ⁶⁴ *Taylor v. Maris*, 90 N. C. 619; *Wilkins v. Allen*, 59 U. S. 385.

⁶⁵ *Clark v. Hornthal*, 47 Miss. 499; *Suydam v. Thayer*, 94 Mo. 49; *Randall v. Josselyn*, 59 Vt. 557. ⁶⁶ *Whitcomb v. Rodman*, 156 Ill. 116, 47 Am. St. 181; *Thompson v. Ish*, 99 Mo. 160; *Tuxbury v. French*, 41 Mich. 7; *Barnard v. Barlow*, 50 N. J. Eq. 131; *Kaufman v. Breckenridge*, 117 Ill. 305.

⁶⁷ *Grimes v. Harmon*, 35 Ind. 198; *Clift v. Moses*, 116 N. Y. 144; *Waldron v. Waldron*, 45 Mich. 350; *Thomas v. Lines*, 83 N. C. 191. ⁶⁸ *Little v. Giles*, 25 Neb. 313; *King v. Ackerman*, 67 U. S. 408; *Reinders v. Koppelman*, 94 Mo. 338; *Staigg v. Atkinson*, 144 Mass. 564; *White v. Holland*, 92 Ga. 216, 44 Am. St. 87; *Henry v. Henry*, 81 Ky. 342; *Worth v. Worth*, 95 N. C. 239.

⁶⁹ *Brome v. Pembroke*, 66 Md. 193; *Re Huntington*, 103 N. Y. 679; *Bingel v. Voltz*, 142 Ill. 214;

clear and certain, then the plain and unambiguous words must prevail and are not to be controlled or qualified by conjectural or doubtful constructions founded upon the situation, circumstances, or conditions, either of the testator, his family or his property.⁷⁰

§ 349. **General and particular intent.**—Where there is a general and a particular intent apparent upon the face of the will, the general intent, as indicative of the paramount purpose of the testator, must prevail over the particular intent when they come in conflict,⁷¹ but full effect should always be given to the particular intent, when ascertained, so far as same may be consistent with such general intent.⁷² And, generally, where there are two intents inconsistent with each other, that which is primary will control that which is secondary.⁷³

The ideas involved in the foregoing remarks find marked illustrations where language of a technical character is employed which, if given legal effect, will defeat the actual intention of the testator. It would certainly seem to be in consonance with the principles of sound reasoning that when a testator in the disposition of his property by will, employs words and phrases to express his intention that have a well-known legal or technical meaning, he must be deemed to have used them in such sense in defining and limiting the estate disposed of, and if the use of such words brings his intention so expressed within a settled rule of law, the latter must prevail, notwithstanding the effect may be to disappoint the actual intention. Were it otherwise technical words would have no

⁷⁰ Mann v. Mann, 14 Johns. (N. Y.) 1; Wadsworth v. Murray, 161 N. Y. 274; Parsons v. Winslow, 6 Mass. 175; Gibson v. Seymour, 102 Ind. 488; McDaniell v. King, 90 N. C. 597; Hill v. Felton, 47 Ga. 455; Forbes v. Darling, 94 Mich. 621; Williams v. Vreeland, 32 N. J. Eq. 734; Taubenhan v. Dunz, 125 Ill. 524; Mackie v. Story, 93 U. S. 589; Stokes v. Van Wyck, 83 Va. 724; Sherwood v. Sherwood, 45 Wis. 357.

⁷¹ McMurry v. Stanley, 69 Tex.

227; Price v. Cole, 83 Va. 343; Pell v. Mercer, 14 R. I. 430; Goddard v. Whitney, 140 Mass. 92; Smith v. Bell, 6 (U. S.) 75; Leathers v. Gray, 101 N. C. 162; Phelps v. Bates, 54 Conn. 11.

⁷² Clark v. Hornthal, 47 Miss. 289; Phillips' Estate, 205 Pa. St. 504, 55 Atl. Rep. 210, 97 Am. St. 743.

⁷³ Smith v. Bell, 6 Pet. (U. S.) 68; Given v. Hilton, 95 U. S. 591; Price v. Cole, 83 Va. 343; McMurry v. Stanley, 69 Tex. 227; Phillips' Estate, 205 Pa. St. 504.

real meaning or stable qualities and rules of law might be subverted to carry out intentions either surmised or imperfectly expressed. While it is true that the intention of the testator must have effect, yet it is the intention that is expressed in the will, and this to be ascertained by a legal interpretation of the language employed.⁷⁴

§ 350. **The rule in Shelley's case.**—A practical illustration of the subject discussed in the last paragraph may be seen in the application of the rule in Shelley's case, where the general intent is permitted to overcome the particular intent. In states where this rule is still in force as a rule of property it determines the meaning and effect of a disposition that comes within it, and the question of intent, in determining whether it is applicable in a given case, does not turn upon the quantity of estate intended to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs.⁷⁵ The effect of this, where the rule is held to apply, usually is to defeat the actual intention of the testator, for where an estate for life is expressly given it is clear that no more was intended. But if the testator afterward gives an estate to the heirs of the life tenant we have another intention, the effect of which is to overcome the particular intention first expressed. If the word "heirs" is given its true and legal meaning then it must be taken as a word of limitation which vests a fee in the first taker.⁷⁶ The only inquiry, in such a case, would seem to be: Was the word used in its legal sense? ⁷⁷ If it was, then nothing can avert the operation of the rule. As has been often shown, this is not a real exception to the rule that the intention of the testator must guide in interpreting a will. Its only effect is to sacrifice a particular to a general intent. It does not, in any proper sense, interpret a will.⁷⁸

§ 351. **Repugnancy.**—A frequent ground for contest of rights claimed under a devise is furnished by an apparent re-

⁷⁴ *Leathers v. Gray*, 101 N. C. 162, 9 Am. St. 30; *Sims v. Conger*, 39 Miss. 231; *Hoope's Appeal*, 61 Pa. St. 220.

⁷⁵ *Baker v. Scott*, 62 Ill. 88.

⁷⁶ See, for special examples, *Wilkerson v. Clark*, 80 Ga. 367; *Carpenter v. Van Olinder*, 127

Ill. 42; *Hochtedler v. Hochtedler*, 108 Ind. 506; *Carroll v. Burns*, 108 Pa. St. 21; *King v. Utley*, 85 N. C. 59.

⁷⁷ *Allen v. Craft*, 109 Ind. 476.

⁷⁸ *Yarnall's Appeal*, 70 Pa. St. 335.

pugnance between different clauses of the will. As a general rule, where the clauses of a will are in irreconcilable conflict the later clause will prevail.⁷⁹ This rule rests upon the theory that in matters of so great solemnity as the making of testamentary dispositions of property it cannot be presumed that a testator would purposely create inconsistent provisions or such as are incapable of being carried into effect, and that, as a will remains ambulatory, where a repugnance cannot be overcome it must be presumed that the testator changed his mind during the drafting of his will and after the writing of the former clause and that the subsequent clause gives expression to a later formed intention. It must be admitted that the theory is far from satisfactory and not infrequently, perhaps, will fail to conform to the actual facts, but it arises out of the very necessities of the case and is adopted by the courts under a choice of difficulties as an aid in arriving at the real intention of the testator as finally expressed in his will.⁸⁰

The fundamental rule of construction, however, requires that the intention shall be found from a consideration of the whole will, which, if possible, should be interpreted in such a manner as will uphold all of its provisions and give to each clause its just operation and effect. It follows, therefore, that the rule which sacrifices a former clause because inconsistent with a later one is never applied, nor the presumption of the fact upon which the rule is predicated indulged in, until it is found, by the other rules of construction, that the difficulty is insurmountable and the clauses remain in irreconcilable conflict. Hence, to enable a court to uphold all of the provisions of a will, it is permissible to resort to every reasonable intendment, and, viewing the instrument as a whole, to reverse the order of the devises and transpose different provisions, if it be possible thereby to render them consistent and give effect to each.⁸¹ It

⁷⁹ *Heidlebaugh v. Wagner*, 72 Iowa, 601; *Ball v. Ball*, 40 La. Ann. 284; *Dickinson v. Dickinson*, 138 Ill. 541; *Phillips' Estate*, 205 Pa. St. 504. But compare *Killmer v. Wuchner*, 74 Iowa, 359.

⁸⁰ *Dickinson v. Dickinson*, 138

Ill. 541; *Van Nostrand v. Moore*, 51 N. Y. 12.

⁸¹ *Mutter's Appeal*, 38 Pa. St. 314; *Pruden v. Pruden*, 14 Ohio St. 251; *Rickner v. Kessler*, 138 Ill. 636; *Phelps v. Bates*, 54 Conn. 11; *Grimes v. Harmon*, 35 Ind. 198; *Succession of Allen*, 48 La. Ann. 1036.

is further held, that repugnant words, in whatever part of the will they may occur, which contravene the evident general purpose and intention as clearly expressed, may be rejected, transposed, or limited and controlled by other and prior provisions and by the general purpose and intent thus clearly manifested.⁸² But this may be resorted to only in case of ambiguity. If there is no ambiguity, then, however unfortunate it may be that the intention of the testator should fail, a court has no right to say that words shall not have their plain and unambiguous meaning, and if two clauses of a will are so inconsistent and irreconcilable that they cannot possibly stand together, the last of the two must prevail,⁸³ even though it results in rendering the will invalid.⁸⁴

The question, however, in almost every case, must turn on the general intention as shown by the entire will. The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and which may justify either of two opposite interpretations; such directions should be so construed as to support the testator's distinctly announced intention.⁸⁵ And, generally, if the main provision plainly covers the whole subject, and is defined in terms that exclude all doubt and the subsidiary provision may by conjecture be made either general or partial, and may be capable by construction either of subverting entirely or modifying only the original gift, such subsidiary provision must in the ordinary case be confined to its partial and restricted operation.⁸⁶

§ 352. Devise of same tract to different persons.—A good illustration of the ideas discussed in the preceding paragraph is furnished in a case where the same tract is devised in two different clauses of a will to two different persons, and the questions which are thus raised are exceedingly difficult and embarrassing. At first blush it would certainly seem that such an attempted disposition creates a case of incurable re-

⁸² *Holliday v. Dixon*, 27 Ill. 33.

⁸³ *Felton v. Hill*, 41 Ga. 554; *Estate of Hunt*, 133 Pa. St. 260.

⁸⁴ *Van Nostrand v. Moore*, 52 N. Y. 12; *Sturgis v. Work*, 122 Ind. 134.

⁸⁵ *Sheetz's Appeal*, 82 Pa. St. 213.

⁸⁶ *Whelen's Estate*, 175 Pa. St. 23.

pugnancy, which calls for the application of the rule that the former of two irreconcilable clauses shall be sacrificed as the only means of escaping from the conclusion that both are void. Indeed, this was the construction adopted in the earlier decisions, and which still continues to find some adherence, but the constant tendency has been to contrive some sort of reconciling construction whereby both clauses may stand and devisees take concurrently. The result of this has been a marked modification of the old rule and the doctrine now generally held is, that where the same thing is given in the same will to two different persons they take either as joint tenants or tenants in common, according to the terms of the devise, the theory in such case being that it is the same as though the two names had been united in one gift of the same estate.⁸⁷

Like many of the rules of construction the foregoing is not in all respects satisfactory, and, it is admitted, will not fully carry out the intention of the testator, particularly where it is evident that a mistake has been made in the drafting of the instrument, but, it is contended, such a course will come nearer to accomplishing the testator's purpose than a total rejection of the former clause and is better calculated to do justice to all parties.

§ 353. *Description of devisee.*—It may be stated as a general rule, that any words that are sufficient to denote the persons meant by the testator, and to distinguish them from all others, will operate as a good description of the devisees under a will, and extrinsic evidence is always admissible in case of doubt to identify the beneficiaries.⁸⁸ Where the devisee is unequivocally described in words which leave no room for doubt, and there is a person in existence who exactly meets the description, no question can ordinarily arise, and usually, where no person other than the claimant sets up a title or appears in the character of a devisee, a presumption is raised in his favor from this circumstance alone, even though he may not, in all respects, answer the description in the will.

⁸⁷ See *Day v. Wallace*, 144 Ill. 256.

⁸⁸ *Gilmer v. Stone*, 120 U. S. 586; *Bradley v. Rees*, 113 Ill. 327; *Hawkins v. Garland*, 76 Va.

149; *Griscom v. Evens*, 40 N. J. L. 402; *Hinckley v. Thatcher*, 139 Mass. 477; *Chappell v. Missionary Society*, 3 Ind. App. 356, 50 Am. St. 276.

But, generally, if the claimant does not come within the precise terms of the description he will be required to show that he does come within the general meaning of the testator, and for this purpose may offer extrinsic evidence to remove the apparent ambiguity.⁸⁹ A mere misnomer will not invalidate a devise if the will itself shows the person intended, nor when such person can readily be ascertained by reference to extrinsic facts.⁹⁰ In cases of misnomer or misdescription of a devisee the law is very lenient and extrinsic evidence is freely received to show the real object of the testator's bounty.⁹¹ The question becomes more complicated where two persons, neither of whom answer the description, claim under the devise, but such question may be determined in like manner by a view of the whole will read in the light of surrounding circumstances, and the proof of facts tending to show which one of the two was intended.⁹²

The question just discussed is sometimes presented where the devise is to a corporation, and there are two corporations, neither of which can claim under the precise name used by the testator. In such a case it is for the court to determine which of the two is best or most nearly described by the name, or which will best and most closely answer the delineation used by the testator; and if, with a knowledge of the names, general character and purposes, of the two corporations, as disclosed by their charters, there is no latent ambiguity, and the court can thus determine which of the two was intended, there can be no resort to other evidence to aid the interpretation.⁹³

§ 354. **Definition of terms—Issue.**—No small part of the litigation growing out of the obscurity of devises is occasioned by the employment of uncertain terms, or of terms that are rendered uncertain by reason of their relation to the context.

⁸⁹ *Phillips v. Ferguson*, 85 Va. 509; *Bradley v. Rees*, 113 Ill. 327; *Webster v. Morris*, 66 Wis. 366; *Palmer v. Horn*, 84 N. Y. 521.

⁹⁰ *Taylor v. Tolen*, 38 N. J. Eq. 91; *Covert v. Selbern*, 73 Iowa, 564; *Hawkins v. Garland*, 76 Va. 149; *Hinckley v. Thatcher*, 139

Mass. 477; *Durham v. Avrill*, 45 45 Conn. 61.

⁹¹ *Magaw v. Field*, 48 N. Y. 668; *Little v. Giles*, 25 Neb. 313.

⁹² See *Webster v. Morris*, 66 Wis. 366.

⁹³ *St. Luke's Home v. Ass'n for Indigent Females*, 52 N. Y. 191.

Of these terms the word "issue" has been, perhaps, more fruitful of contested successions than any other and a review of current cases shows that it still continues to exert a marked influence on the effect to be given to attempted testamentary dispositions.

As a general proposition, the word "issue," when used in a will, has the same meaning as offspring, and includes all descendants in being at the time it becomes operative;⁹⁴ although in a few instances it has been construed to mean children only.⁹⁵ But the volume of authority seems to sustain the conclusion that whenever used as a word of purchase, and where its meaning is not otherwise defined, or qualified by the context, it comprehends all persons in the line of descent from the ancestor, and has practically the same meaning as "descendants."⁹⁶ In such event, while it embraces the children of an ancestor it is only because they are descendants in common with other persons who can trace a descent from the same source.⁹⁷

Where there is a clear intent to limit or restrict the legal significance of a technical term, such intent will generally be allowed to prevail, and, hence, if the word "issue" is manifestly employed in one part of a will to indicate children then its use in other parts should be given the same signification. In such a case it must be inferred that it was used in the same sense throughout, for it is a rule that courts will not construe the same word used in different parts of a will as having different meanings, if it is possible to avoid doing so.⁹⁸

The words "next of kin" limit the devise to blood relations, and hence do not include husband or wife,⁹⁹ unless accompanied by other words clearly manifesting a purpose to ex-

⁹⁴ This is the old English rule and has been generally followed in this country.

⁹⁵ *Dexter v. Inches*, 147 Mass. 324. This is urged by such eminent authorities as Kent, and Redfield. See 4 Kent, Com. 278; Red. Wills, Pt. II, *41 *et seq.*

⁹⁶ *Wistar v. Scott*, 105 Pa. St. 200; *Pearce v. Rickard*, 18 R. I. 142.

⁹⁷ *Soper v. Brown*, 136 N. Y. 244.

⁹⁸ *Madison v. Larmon*, 170 Ill. 65; *Palmer v. Horn*, 84 N. Y. 516.

⁹⁹ *Townsend v. Radcliffe*, 44 Ill. 446; *Murdock v. Ward*, 67 N. Y. 387; *Tillman v. Davis*, 95 N. Y. 17.

tend their signification.¹ As shown elsewhere the statute, in some states, has destroyed the integrity of this rule and in those states the effect of the statute may give the *status* of kin to those who are not of the same blood. The term "relatives" is a colloquial phrase and contains no elements of legal certainty.²

§ 355. **Continued—Children.**—The commonly accepted definition of the word "child," and that which has received the approval of lexicographers and dictionary compilers, is, a son or daughter; a male or female descendant in the first degree.³ It has no technical or special meaning in law, and should be given its usual and generally understood meaning whenever occasion arises for its construction.

But when employed in testamentary dispositions the exigencies of particular cases may induce an extension of meaning, and the cases are not rare where the term "children" has been held co-extensive with "issue" or "descendants." Nor will the word "child" properly include a "grandchild",⁴ yet sometimes that meaning is affixed to it when the will would otherwise remain inoperative.⁵ But, where this is done, the holding does not rest upon the ground that the words "child" or "children" have any technical or peculiar meanings in the law, but because such meanings, beyond the natural import of the words, are necessary to give effect to a devise, or because of an evident intent upon the part of a testator.⁶

The word "children" in a will is generally taken as a word of purchase and not of limitation, and, as a rule, will not be construed to mean heirs unless the testator has employed other words which unmistakably indicate an intention to use it as a word of limitation.⁷

¹ Haraden v. Larrabee, 113 Mass. 430.

² Handley v. Wrightson, 60 Md. 198.

³ See Webster's Dictionary; Gernet v. Lynn, 31 Pa. St. 94; Cummings v. Plummer, 94 Ind. 403.

⁴ Moffat v. Carrow, 7 Paige (N. Y.) 328; Hopson v. Commonwealth, 7 Bush (Ky.), 644.

⁵ Re Curry's Estate, 39 Cal. 529; Estate of Hunt, 133 Pa. St. 260; Douglass v. James, 66 Vt. 21; Felt v. Vanata, 21 N. J. Eq. 84.

⁶ Estate of Chapoton, 104 Mich. 11, 53 Am. St. 454.

⁷ Oyster v. Knull, 137 Pa. St. 448.

§ 356. **Continued—Heirs.**—Devises are frequently made, particularly with respect of residuary interests, to the “heirs,” “lawful heirs,” “heirs at law,” etc., of the testator or some other person, and the effect of such devises seems to be to pass the estate so given to such persons as, at the time of testator’s death, answer such description by the then existing law.⁸ It is further to be noted that a devise of this character contemplates not only changes arising from death in the persons designated by the term “heirs,” but also changes by legislation, or in the laws regulating succession and descent.⁹ Notwithstanding some ancient authority to the contrary the general rule would now seem to be, that the terms “heirs at law”, “heirs of the body”, or kindred terms indicating a devise to such persons as a class, to take effect at a particular time, entitles them to take as purchasers and not by descent, and this will always be the case where the estate is made absolute by additional words of inheritance.¹⁰

More frequently, however, the questions raised in connection with such words have reference to the method of distribution of the estate so vested among the individuals or members of the class. As a general proposition if the gift is to a class designated as heirs of a particular person, resort must be had to the statute of descents to ascertain what persons compose the class as well as to determine the proportions they shall take.¹¹ But the testator, while leaving the persons to be ascertained by reference to the statute, has a right to fix the shares they shall take, and where the will prescribes a different mode of distribution from that indicated by the statute the intention of the donor will prevail and the distribution must be in the manner prescribed. Thus, where the devise is to the “heirs of the body”, followed by the direction “share and share alike”, or similar expressions, while the statute determines the parties who are to take, the methods of distribution is fixed by the devise.¹²

⁸ Dodge’s Appeal, 106 Pa. St. 216; Dukes v. Faulk, 37 S. C. 255; Wadsworth v. Murray, 161 N. Y. 274.

⁹ Aspden’s Estate, 2 Wall. Jr. (C. Ct.) 368.

¹⁰ Duke v. Faulk, 37 S. C. 255, 34 Am. St. 745.

¹¹ Mullen v. Reed, 64 Conn. 240.

¹² Duke v. Faulk, 37 S. C. 255.

Where a devise is made to heirs on the termination of a precedent estate given by the will, or where a class, by this designation, is appointed to take the estate on the failure of a specific devise, the general rule is that the remainder, or estate over, is limited to the persons who sustain the character of heirs at the death of the testator, and the will is usually held to speak as of that time.¹³ But the rule is not inflexible and the intention of the testator, manifested by the language of the will, is rather to be regarded than technical rules.¹⁴

When used in a will the term "heirs" will ordinarily be construed to mean statutory heirs of every kind and degree,¹⁵ but under certain circumstances, as where the word is used in the sense of children, it may be confined to immediate descendants.¹⁶

§ 357. **Illegitimates.**—Questions of legitimacy will sometimes arise under wills where devisees are not specifically named but are designated only as classes; as where a devise is made to the "children" of a certain person. Ordinarily where the terms "child" or "children" is employed in connection with testamentary gifts such terms will be given effect only as they may apply to legitimate children,¹⁷ and the term "issue" is generally held to fall within the same construction.¹⁸ But where a child, though born a bastard, is afterward legitimated by the marriage of his parents it will be entitled to share with other offspring born of the marriage under a devise to his father's "children".¹⁹

§ 358. **Adoptive heirs.**—There is no question as to the right of an adopted child to take by inheritance the estate of the adopting parent. Such being the case it would seem, on

¹³ *Ruggles v. Randall*, 70 Conn. 44; *Re Tucker's Will*, 68 Vt. 104; *Grimmer v. Friederich*, 164 Ill. 245; *Wadsworth v. Murray*, 161 N. Y. 274; *Downing v. Nicholson*, 115 Iowa, 493, 88 N. W. Rep. 1064, 91 Am. St. 175.

¹⁴ *Downing v. Nicholson*, 115 Iowa, 493.

¹⁵ *Richards v. Miller*, 62 Ill. 417.

¹⁶ *Butler v. Huestis*, 68 Ill.

594; *Haverstick's Appeal*, 103 Pa. 394.

¹⁷ *Bolton v. Bolton*, 73 Me. 309; *Gates v. Seibert*, 157 Mo. 254.

¹⁸ *Kingsley v. Broward*, 19 Fla. 722; *Black v. Cartmell*, 10 B. Mon. (Ky.) 188; *Jenkins v. Jenkins*, 64 N. H. 407.

¹⁹ *Gates v. Seibert*, 157 Mo. 254.

principle, that the *status* of heirship should be efficient for all purposes. In numerous instances, however, the right has been denied in cases where land has been devised to persons of a class denominated "heirs", and particularly where such term has been qualified by the adjective "lawful". Thus, where adopted children have claimed under wills devising lands to the testators "lawful heirs", courts have drawn a distinction between lawful heirs and heirs by adoption, and held that the relation of heir by adoption does not come within the ordinary and usual meaning of the words "lawful heirs."²⁰ It is not denied that the *status* or relation of an adopted heir is a lawful one, since the law sanctions same and provides a method for its creation, but it is contended that such relation is not the creature of law, but of the act of the parties and rests upon a contractual undertaking. Hence, they say, "adopted heir" would be appropriately descriptive of such relation, distinguishing it from that sustained by heirs upon whom the law casts descent, and who are heirs by law.

It is difficult to follow the reasoning involved in the decisions which sustain these views, or to understand why an heir created by one lawful method is not just as much entitled to the rights which attend the *status* as an heir created by some other lawful method, but where this doctrine has been announced there is no room for discussion and we must take the law as we find it.

Where the limitation is to the "heirs of the body" of an individual named the persons taking must, of course, answer the requirements of lineal descendants of the parent stock, and the same is generally true of "lawful issue". In such cases adoptive children will not take,²¹ the rule being that descendants only will come within the definition of the terms.²²

§ 359. **Description of land devised.**—It is frequently asserted, that inasmuch as a will is always construed in the most favorable manner, for the benefit of the devisees, the same ac-

²⁰ *Reinders v. Koppelman*, 94 Mo. 344; *Morrison v. Sessions*, 70 Mich. 297.

²¹ *New York, etc. Co. v. Viele*, 161 N. Y. 11.

²² *Palmer v. Horn*, 84 N. Y. 519; *Wyeth v. Stone*, 144 Mass. 441; *Schafer v. Eneu*, 54 Pa. St. 304.

curacy is not required in the description of those things which are intended to be devised as is necessary in a deed; it being enough if the words denote, with sufficient certainty, what is meant to be given. This has long been a favorite doctrine of the English courts,²³ and its general spirit has been adopted and confirmed by the courts of the United States.

But, in the application of the principle involved in the foregoing statement it must not be understood that the rules of construction are any different in the case of wills from those which obtain in the case of deeds. About all that is intended is, that words of general meaning shall be so construed as, if possible, to carry out the express or necessarily presumed intention of the testator. Thus, such terms as "lands, tenements and hereditaments" will be sufficient to pass every species of real property, while such terms as "estate", "property", etc., will usually be permitted to have the same effect.²⁴ In England, where the rule above stated was originally formulated, there exists no such system of land parceling as is in use in the United States, and lands are frequently conveyed by vague and uncertain descriptions. Such terms as "messuage", "curtilage", "close", etc., are practically unknown to our law, and the specific significations which have become attached to them in England would hardly be recognized in this country. The rule of lax interpretation grew out the employment of these terms by the English conveyancers and the English decisions present many instances that could not be followed as authority in a majority of the states.

Where general terms are employed extrinsic evidence will usually be received to identify the subject matter of the devise,²⁵ but if the land is clearly described the weight of authority seems to be that extrinsic evidence is inadmissible to change the pur-

²³ See Cruise, Dig. tit. 38, c. 10.

²⁴ Archer v. Deneale, 1 Pet. (U. S.) 585; Jackson v. Housel, 17 Johns. (N. Y.) 281; Korn v. Cutler, 26 Conn. 4; Monroe v. Jones, 8 R. I. 526. This is directly contrary to the earlier and more technical rule, which confined these words entirely to

personalty, unless there was something in the context to show that the testator intended a more enlarged meaning.

²⁵ White v. Holton, 23 N. J. L. 330. And see Johnson v. McKay, 119 Ga. 196, 45 S. E. Rep. 992.

port of the will, even though the effect may be to produce intestacy.²⁶ This phase of the subject will be further considered in the succeeding paragraph.

§ 360. **Erroneous description—The rule stated.**—It will frequently happen that through inadvertence, oversight, ignorance or carelessness a wrong description of the lands intended to be devised is inserted in the will, and the questions thus presented seem to have been productive of much diversity of judicial opinion. In some instances it has been held that mistakes of this character constitute latent ambiguities which may be explained, and, in effect, corrected by extrinsic evidence.²⁷ This, however, is contrary to the old and long established rule which provides that parol evidence cannot be adduced either to contradict, add to, or explain the contents of a will, and the principle of this rule imperatively demands an inflexible adherence to it, even where the consequence is a partial or total failure of the testator's intended disposition. As has been well said, it would be of little avail to require a will to be in writing or to fence a testator around with a guard of testing witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources.²⁸ This doctrine has repeatedly been approved and reaffirmed by many American courts and where it has secured an adherence it is usually strictly applied. It is true that such courts, for the purpose of determining the object of the testator's bounty, or the subject of disposition, will receive parol evidence to enable them to identify the person or thing intended, yet, where the devise is certain, they will not permit its terms to be altered, even where the testator has by mistake misdescribed the land, by substituting that which could be clearly proved to have been intended.²⁹

²⁶ *Bingel v. Volz*, 142 Ill. 214, 34 Am. St. 64; *Christy v. Badger*, 72 Iowa, 581.

²⁷ See *Patch v. White*, 117 U. S. 210. This is a leading case upon this point, and in it the principle of the text seems to have been carried to extreme

length. See, also, *Pocock v. Redinger*, 108 Ind. 573; *Eckford v. Eckford*, 91 Iowa, 54; *Seebrock v. Fedawa*, 33 Neb. 413; *Moreland v. Brady*, 8 Oreg. 303; *Rogers v. Rogers*, 78 Ga. 688.

²⁸ 1 Jarman, Wills, 409.

²⁹ *Bingel v. Voltz*, 142 Ill. 214,

The decisions in which this doctrine is announced proceed upon the theory that in the construction of a will the purpose is to arrive, if possible, at the intention of the testator, but the intention sought for is not that which may have existed in the mind of the testator, but that which is expressed by the language of the will; and while reference may be had to surrounding circumstances, thus enabling the court to place itself in a position where it may interpret the language used from the standpoint of the testator at the time he employed it, still, surrounding circumstances cannot be resorted to for the purpose of importing into the will any intention which is not there expressed.³⁰

Under this construction the result may be to defeat the real intentions of testators, which, by mistakes in the drafting of their wills, they have failed to adequately express. Thus, where a testator devises land which he does not own, accurately describing it, and the correction of the description, so as to make it apply to the right tract, requires not only that some of the words shall be stricken out but that others shall be inserted, the process involves more than mere construction. In effect

34 Am. St. 64; *Bishop v. Morgan*, 82 Ill. 351; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; *McDaniel v. King*, 90 N. C. 597; *Sherwood v. Sherwood*, 45 Wis. 357; *Ehrman v. Hoskins*, 67 Miss. 192, 19 Am. St. 297; *Crooks v. Whitford*, 47 Mich. 283. In *Judy v. Gilbert*, 77 Ind. 96, a will described property as the "northeast quarter of the southwest quarter" of a section of land. It was held that parol evidence was not admissible to show that the "northeast quarter of the southeast quarter" was intended, even though it appeared that the testator owned no such land as that described and no other land than that which it was claimed he intended to devise. In the opinion it was said: "There is no mistake here upon the face of the

will which is here subject to investigation. There is no latent ambiguity. The property devised is accurately described. The claim is not that there is an inaccurate description apparent upon the face of the will, but that the testator ought to have described some other property. The court is asked to admit parol evidence to show that, although the testator described with perfect accuracy one parcel of land, he meant another. The bare statement of the appellant's position exposes its hostility to fundamental and salutary principles of jurisprudence."

³⁰ *Bingel v. Voltz*, 142 Ill. 214, 34 Am. St. 64; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; *Christy v. Badger*, 72 Iowa, 581.

such a course is a reformation, and, in most of the states, courts have persistently refused to reform wills.³¹

§ 361. **Continued—Qualifications of the rule.**—But, even where the rules just stated are recognized and applied, the uniform tendency of the courts is to lean toward such constructions as will avoid even partial intestacy. Indeed, the generally received presumption is, that when a person makes a will he intends to dispose of his whole estate,³² and in furtherance of this presumption, where it is found that the language of a will, as written, will defeat this presumed intention, if a description can be corrected without adding to the testator's language, such correction may be made as will carry the intention into effect.³³ Thus, so much as may be false in the description of the land devised may be stricken out, provided enough remains to identify the actual parcel intended,³⁴ and this principle, in some cases, has been carried to extreme lengths. So, too, if parts of the description are inconsistent with other parts, and enough of them are consistent to identify the property, whatever is repugnant may be rejected, and the devise as thus corrected be enforced.³⁵

But many courts have gone much farther than this, and, following modern English precedents, have admitted oral proof to show that one word was used for another or that an essential term, necessary to make the definition perfect, was omit-

³¹ Wood v. White, 32 Me. 340; Sturgis v. Work, 122 Ind. 134; Starkweather v. Bible Society, 72 Ill. 50; Willis v. Jenkins, 30 Ga. 167.

³² Higgins v. Dwen, 100 Ill. 554.

³³ See Eckford v. Eckford, 91 Iowa, 54; Whitcomb v. Rodman, 156 Ill. 116, 47 Am. St. 181; Burge v. Hamilton, 72 Ga. 568; Cleverly v. Cleverly, 124 Mass. 314; Morgan v. Burrows, 45 Wis. 211; Groves v. Culph, 132 Ind. 186. In the case of Rogers v. Rogers, 78 Ga. 688, a testator devised "all the land contained in eighty one, west side of the old

run of Flat Creek." It appeared, however, that he had never owned nor claimed title to lot 81, or any part of it, but that he did own lot 79, which, in other respects, fulfilled the description of the devise. The court held that the land being perfectly described by its location, the mere erroneous use of the wrong lot number would not render the devise inoperative.

³⁴ Whitcomb v. Rodman, 156 Ill. 116, 47 Am. St. 181; Groves v. Culph, 132 Ind. 186.

³⁵ Bingel v. Voltz, 142 Ill. 214, 34 Am. St. 64.

ted or erroneously stated. We can readily see the propriety of this where the description is ambiguous, as where, in an English case, the devise was of the manor of B and it was shown that there were two manors, one known as East B and the other as West B. In such case parol evidence was admitted to explain the ambiguity.³⁶ Following such precedents, and applying the general rule that notwithstanding there may be error in the description it will not avoid the devise if enough remains to show with reasonable certainty what was intended, it has been held in a number of cases that parol evidence is admissible to correct the mistake. Thus, under the decisions we are now considering, where a devise is of lots 3 and 4 in block 5, and it appears that the testator did not own lot 3, parol evidence may be admitted to show that he did own lots 4 and 5 in such block, and the will may be construed as passing the title to the lots he actually owned.³⁷ This, it is contended, is a proper application of the rule that for the purpose of arriving at the intention of the testator the will should be read in the light of surrounding circumstances, and where it is reasonably apparent that a testator intended to devise all the lots he possessed, it necessarily follows that lot 5 was intended instead of lot 3, and the will should be given effect as a devise of the lots actually owned. The rule, that a general intent will overcome a special intent, has also been applied in cases of this kind for the purpose of avoiding total or partial intestacy. Thus, where a will purported to devise "all my real estate, to wit," and then specifically described lands which, the testator did not own, the description being an evident mistake of the draughtsman, it was held a valid devise of such undescribed land. In

³⁶ *Oxenden v. Chichester*, 4 4 Dow (Eng. H. of L.), 65.

³⁷ *Seebrook v. Fedawa*, 33 Neb. 413, 29 Am. St. 488; *Moreland v. Brady*, 8 Oreg. 303; *Eckford v. Eckford*, 91 Iowa, 54. But compare *Christy v. Badger*, 72 Iowa, 581. In *Winkley v. Kalme*, 32 N. H. 268, where a testator devised "thirty-six acres, more or less, in lot 37, in 2d division in

Barristead," and there was no such lot as that mentioned in the 2d division in that town, but there was lot number 97 in that division, a part of which the testator had possession of, the court held that there was a latent ambiguity in the devise which might be explained by parol evidence.

arriving at this decision the court found that the language of the will conclusively showed that the devise was intended to operate upon the land then owned by the testator, and that the erroneous description should not be permitted to overcome this intention. Therefore it permitted the substitution of the word northeast for southeast as written in the will, and, as an aid in making the substitution, received extrinsic evidence to show that testator, at the time of execution, owned the northeast quarter of the section mentioned and did not own the southeast.³⁸

§ 362. **Devise upon condition.**—A devise may be made with a condition annexed to the grant, and such condition may be either precedent or subsequent. As there are no technical words to distinguish between these two forms of condition the question always becomes one of intention, and, hence, a matter of construction.³⁹ The general rule is, that if a condition precedent is annexed to a devise and its performance is or becomes impossible, the devise fails, notwithstanding there is no default or laches on the part of the devisee. On the other hand, if the condition is subsequent, and its performance becomes impossible, without fault of the devisee, the estate is not defeated, but the devisee will hold the land by an absolute title as if no condition had been annexed to the devise.⁴⁰ So also, if the condition is repugnant to the estate granted it will usually be of no effect,⁴¹ and the same result follows where it contravenes either law or morals.⁴²

Where land is devised upon the condition that the devisee shall perform certain acts, as that he shall pay specified legacies, etc., the general rule is that the fulfillment of the condition is

³⁸ *Rook v. Wilson*, 142 Ind. 24. And see *Cleveland v. Spilman*, 25 Ind. 95; *Morgan v. Burrows*, 45 Wis. 211.

³⁹ *Burdis v. Burdis*, 96 Va. 81; *Markham v. Hufford*, 123 Mich. 505, 82 N. W. Rep. 222, 81 Am. St. 222; *Robinson v. Gleason*, 47 Me. 259.

⁴⁰ *Burdis v. Burdis*, 96 Va. 81. And see *Harrison v. Harrison*,

105 Ga. 517; *Conrad v. Long*, 33 Mich. 78; *Livingstone v. Gordon*, 84 N. Y. 140; *Morse v. Hayden*, 82 Me. 227; *Burnham v. Burnham*, 79 Wis. 566; *Cassem v. Kennedy*, 147 Ill. 660.

⁴¹ *Kaufman v. Burgert*, 195 Pa. St. 274; *Zillmer v. Landguth*, 94 Wis. 607.

⁴² *Eldred v. Meek*, 183 Ill. 26.

essential to the vesting of the estate,⁴³ and proof of performance will be necessary to establish title. Where the conditions are limited as to time, and are not performed within such time, the devise will not take effect.⁴⁴ It will be seen, therefore, that a devise upon condition always raises an inquiry with respect to the discharge of the condition, and this inquiry must be satisfactorily answered where a right of property is founded thereon.

§ 363. **Devise of power of disposition.**—Interesting and sometimes difficult questions are presented where a claimant asserts a right to possession indirectly under a devise, as where he founds his right upon a conveyance from a devisee of a life estate with power of disposition of the remainder. While the questions raised by a transaction of this kind are not free from doubt the general rule would yet seem to be, that where an estate is given to a person generally or indefinitely, with a power of disposition, it carries the fee.⁴⁵ But where the devisee is expressly given an estate for life only, with a power of disposition of the remainder, the express limitation for life will control the operation of the power and prevent it from enlarging the estate to a fee. This, at least, is the doctrine laid down by all of the early writers,⁴⁶ and which has been substantially followed by many later decisions.⁴⁷ The question is further complicated where, notwithstanding the power, there is a remainder over. In such event it has been held in some cases that the power is inoperative except as to the life estate.⁴⁸

⁴³ *Nevius v. Gourley*, 95 Ill. 206. ⁴⁴ *Nevius v. Gourley* (second hearing), 97 Ill. 356; *Den v. Messenger*, 33 N. J. L. 490.

⁴⁵ *Rand v. Meir*, 47 Iowa, 607; *Seigwald v. Seigwald*, 37 Ill. 430; *Roseboom v. Roseboom*, 81 N. Y. 356.

⁴⁶ 4 Kent, Com. *535; Cruise, Dig., tit. 38, c. 13, § 5; Jar. on Wills (Bigelow's ed.), *873.

⁴⁷ *Jones v. Bacon*, 68 Me. 34; *Gifford v. Choate*, 100 Mass. 346; *Burleigh v. Clough*, 52 N. H. 267; *Benker v. Jacoby*, 36 Iowa,

273; *Hamlin v. Express Co.*, 107 Ill. 443.

⁴⁸ In the leading case of *Smith v. Bell*, 6 Pet. (U. S.) 68, an estate was given for life, with a power of disposition and a remainder over. The supreme court held that the power of disposal was restricted to the life estate. In *Gifford v. Choate*, 100 Mass. 340, Hoar, J., noticing *Smith v. Bell*, says: "The authority of *Smith v. Bell* is somewhat impaired by the circumstances that no counsel were heard on behalf of the party

But it is not in contravention of any rule of law to create a life estate with a power in the donee thereof to convey and limit a remainder after its termination,⁴⁹ and the constant tendency of modern decisions is to treat a devise of this character *sa* equivalent to a gift in fee,⁵⁰ particularly when a title derived through the exercise of the power is asserted by a grantee of the donee.⁵¹ The method of disposal by the donee of a power has been discussed in another place.⁵²

§ 364. **Devise by joint tenant.**—The estate of joint-tenancy has become so infrequent in the United States that few questions are now presented with respect to the assertion of rights growing out of it. Both at common law and under the statute as generally enacted, a joint tenant has the right of alienation by deed of his particular share in the common property, and when such alienation is made it has the effect of defeating his cotenant's right of survivorship. But, unless there has been a severance of the tenancy during the lifetime of the tenants, upon the death of one the survivorship immediately accrues to the other, who then holds in severalty.

It will sometimes happen, however, that a joint tenant who has failed to exercise his privilege of alienation during life attempts to dispose of his interest at death by way of devise. This

against whom it was made, and the attention of the court does not seem to have been drawn to the authorities in favor of the opposite conclusion. But the decision is made to rest upon the fact that the remainder was the only substantial provision made by the will for the testator's only child, and there were no words directly extending the wife's interest beyond her life." *Smith v. Bell* has been followed by the supreme court of the United States in *Brant v. Coal Co.*, 93 U. S. 326, 23 L. Ed. 927; *Giles v. Little*, 104 U. S. 291, 26 L. Ed. 745.

⁴⁹ *Welsch v. Bank*, 94 Ill. 191; *Jassey v. White*, 28 Ga. 295; *Downey v. Bordan*, 36 N. J. L. 460.

⁵⁰ See *Funk v. Eggleston*, 92 Ill. 515; *Hazel v. Hagan*, 47 Mo. 277; *Levy v. Griffiths*, 65 N. C. 236; *Lyon v. Mash*, 116 Mass. 232.

⁵¹ In *Cummings v. Shaw*, 108 Mass. 159, the court, in construing a gift of this kind, said: "This clause gives to the plaintiff either an estate in fee on the ground that power to convey an absolute estate is an attribute of ownership and carries with it a fee, or it gives an estate for life, with power to convey an absolute estate; and upon either construction the plaintiff is able to convey to the defendant a fee simple, and thus perform his contract. And see *Wright v. Westbrook*, 121 N. C. 156.

⁵² § 304.

he was not permitted to do at common law, nor have the statutes, as a general rule, removed the disability. An interest, to be disposed of by devise, must be such as would otherwise have descended to heirs, and, as the interest of a joint tenant does not descend but vests in the survivor, it follows that it cannot be a subject of disposition by last will. A devise of this kind, therefore, is inoperative and void and vests no title in the devisee.⁵³

Questions respecting the right of a devisee will arise most frequently where the language creating the tenancy is doubtful or ambiguous. A joint tenancy can be created only in the manner provided by statute, which usually requires the employment of express terms in the instrument of conveyance.

§ 365. **Void devise.**—It was a cardinal rule of the common law that where a testator made the same disposition of his estate as the law would have done had he refrained from acting, the will, being unnecessary, was void.⁵⁴ Notwithstanding that this has long ceased to be the rule in England,⁵⁵ we still find occasional expressions of the doctrine by American courts, who assign as a reason for their decisions the old and exploded idea of the feudal law. That is, that descent is the worthier title. Under the American system of titles and estates this is simply mediaeval nonsense. It is true that by the old feudal tenures, where inheritance was limited to one heir, and he the oldest or only son, a descent strengthened the title by taking away the right of entry of those who might have some interest in the land, whereas, if the heir took by devise he was in only by purchase, and for this reason the rule was generally observed in cases which came within it. But, from a very early day,⁵⁶ to render this rule effective, the devisee was required to be the sole heir to the lands devised, and even then, if the estate so given to him differed either in quantity or quality from that which he would have taken by descent, the devise would prevail and the devisee would take under it as a purchaser.

The reason of the ancient rule never had any application in the United States and the rule itself has been generally repudiated.

⁵³ *Wilkins v. Young*, 144 Ind. 1, 55 Am. St. 162.

⁵⁴ *Cruise, Dig.*, tit. 38, c. 8.

⁵⁵ It was changed by Stat. 3 & 4 Wm. IV., c. 106.

⁵⁶ See *Plowden*, 545.

CHAPTER XI.

TITLE BY DESCENT.

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398. Presumption of time of death.
399. Continued — Death of children.
400. Survivorship.
401. Civil death.
402. Posthumous children.
403. Illegitimates—The rule stated.
404. Continued — Variances and statutory exceptions.
405. Legitimation.
406. Extra-territorial effect of legitimation.
407. Adoptive heirs.
408. Rights of adoptive heirs.
409. Extra-territorial effect of adoption.
410. Proof of adoption.
411. Continued—Parental consent.
412. Heirship through affinity.
413. Inheritance of contingent estates.
414. Declarations and admissions of ancestor.</p> |
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§ 366. **Generally considered.**—The title which the law raises for the heir upon the death of the ancestor, although for practical purposes regarded as a new title springing from the ancestor's death, and which, when asserted, must be so proved, is, in reality, but a continuation of the ancestor's title which the law casts upon the heir at the moment of death. The title of an heir, however, is held in his own right, subject only to the payment of the ancestor's debts and the fulfillment of his covenants. It is a further maxim that the heir is favored by the law and his inheritance is never defeated except by the clearest proof of intention on the part of the ancestor, and every right or interest in land to which the ancestor was in any manner entitled at the time of his decease, except estates for his own life and such as come within the definition of chattels real, becomes vested in the heir as a legal appointee. Whenever the death of any person is shown, until rebutted, the presumption is that he died intestate and that his estate descends in pursuance of the laws of inheritance.

By the old English law descent was regarded as the most meritorious form of title that could be asserted, and occasionally we find some belated American court re-stating this old feudal idea. But the conditions which gave rise to this idea have long passed away in England and in this country can hardly be said to have ever existed. At the present time title by descent is of no higher dignity than any of the familiar forms of purchase. It is frequently subject to many infirmities and usually requires for its establishment an elaborate method of proof, both as to the ancestor and the heir.

In the trial of contested titles claims of succession are often made to play conspicuous parts, and cases frequently turn upon the interpretation of the laws of inheritance as applied to particular facts. In the paragraphs following the general features of the laws of descent will be briefly reviewed with special reference to their employment in actions of ejectment.

§ 367. **Conflict of laws.**—It is now a firmly established rule that the descent of real property is governed exclusively by the laws of the state wherein such property is situated, and that the rights of all persons claiming as heirs must be measured

and determined solely by such laws.⁵⁷ The domicile of the decedent is immaterial in such case and its laws are effective only with respect to the personal estate. It is a further established rule that the law as it existed at the time of the ancestor's death must control in the distribution of his estate,⁵⁸ and, notwithstanding a statutory change has been made at the time a succession is claimed, his estate will descend and vest in those only who by the law as it then existed are nominated as heirs.⁵⁹

§ 368. **What interests descend.**—The law which fixes the *status* of heirs is also competent to declare what interests they shall take as well as the share or proportion that shall go to each. Such law may also define the kind and nature of proprietary rights that survive the death of an owner, and may direct the channel through which they shall pass to a successor in interest. As these are all matters which lie in the sovereign prerogative of the state, and as no two states have adopted in all respects the same procedure, of necessity, recourse must be had to the law of the place where the land is situate for the determination of questions respecting title or possessory right.

It goes without saying that every estate of inheritance possessed by an ancestor vests in his heirs or legal appointees at the time of his death, except so far as he may have otherwise provided by will. An estate of inheritance is usually a fee. Indeed, the fee is so defined in the works of the elementary writers. When this is the case, and the right of the heir is established, questions relative to possession and recovery are much simplified. But, an estate may descend that is not a fee, provided it is a freehold, and the heir may assert the same rights with respect thereto as though it were a fee. Thus, if A has an estate for his own life this is a freehold interest that he may convey to another. Now if he conveys this estate to B and the latter dies during the lifetime of A, what becomes of the residue of the estate? The common law solved the ques-

⁵⁷ *Harvey v. Ball*, 32 Ind. 98; *Smith v. Kelly*, 23 Miss. 167; *Hawley v. James*, 7 Paige (N. Y.) 213; *Lingen v. Lingen*, 45 Ala. 410.

⁵⁸ *Brown v. Critchell*, 110 Ind. 40; *Hale's Appeal*, 69 Conn. 611.

⁵⁹ *Hosack v. Rogers*, 6 Paige (N. Y.), 415; *Hale's Appeal*, 69 Conn. 611; *Messer v. Jones*, 88 Me. 349.

tion by saying that in such event there would be an abeyance of title; that because the estate was a freehold it could not pass to the administrator, and because it was not a fee it would not vest in the heir, and hence, as there was no recognized legal owner, any person entering upon the land might occupy it until the particular precedent estate had determined. But this old and absurd doctrine is exploded in the United States; the ancient ideas concerning abeyance have been discarded, and the law, which strenuously insists upon an owner for all lands, has provided for a descent of such *residuum* in the same manner as other estates which survive the death of the owner. As the estate is a freehold it follows that it should not pass to the administrator, though in some states this would seem to be the case, and that the heirs of B would take the interest during the life of A. Such being the case it further follows that they might maintain ejectment thereon against any person unlawfully interfering with the possession.⁶⁰

But an estate for life should be distinguished from a lease for life. The latter is but a chattel interest, and, in case of a conveyance as above and the death of the assignee, it would pass to the personal representative, who alone would have a right to institute a suit for possession.⁶¹ It may be said, and with much truth, that the distinction is subtle, but it is a distinction which the courts have made and which we must observe. The test, presumably, will lie in the fact of reservation of annual rent, and such other features as go to establish the relation of landlord and tenant. When this is shown the estate vests in the personal representative.

§ 369. **Tracing descent.**—Except as hereinafter noted, title to real property, by hereditary succession, accrues only to those who can show an alliance in blood with the person last seized. This is accomplished by a demonstration of legitimate relationship, the details of which will be considered farther on, showing the degree of kinship in which the claimant stands to the deceased. The relation subsisting among all the different persons descending from the same stock, or common ancestor,

⁶⁰ *Cunningham v. Baxly*, 96 Ind. 368.

⁶¹ *Smith v. Dodds*, 35 Ind. 452; *Cunningham v. Baxly*, 96 Ind. 369.

is called *consanguinity*. This may be either lineal or collateral, the former being the relation which exists among persons where one is descended from the other, as between father and son, in the direct line of descent; the latter is the relation subsisting between persons descended from the common ancestor, but not from each other, as between brother and sister. The several stages by which one person connects himself with an ancestor or through which he establishes the fact of relationship, is called a *pedigree*.

§ 370. **Degrees of consanguinity.**—There are two methods of computing the degrees of consanguinity, known respectively as the *civil* and *common-law* methods, the latter being also the same as the *canon* law. The rule of the civil law is generally used in this country, and is preferable, for that it points out the actual degree of kindred in all cases. This mode of computation begins with the intestate, and ascends from him to the common ancestor, and descends from such ancestor to the next heir, reckoning a degree for each person, both ascending and descending, and the degrees they stand from each other is the degree in which they stand related. According to this rule of computation, it will be seen the father of the intestate stands in the first degree, his brother in the second, his nephew in the third, etc. By the common-law method of computation, different relations may stand in the same degree, and the degrees are counted the same whether lineal or collateral. The mode of the common and canon law is to discover the common ancestor, and beginning with him to reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them. By this means the father and brother of the intestate, or person proposed, stand in the same degree. By the civil law the father stands in the first degree, the brother in the second. So by the common law the first cousin ⁶² stands in the second degree; by the civil law he would stand in the fourth.

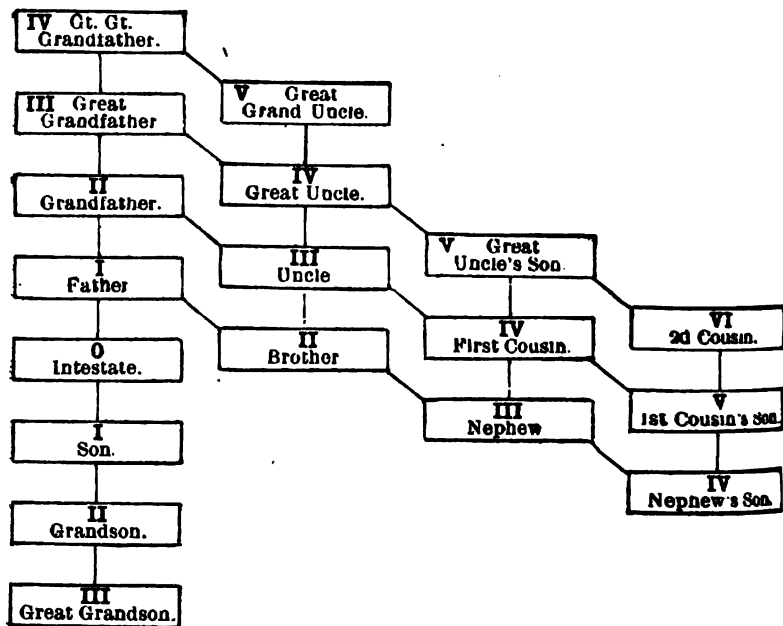
⁶² **Cousin** (*consanguineus*) whom we usually call cousins. means kinsmen, in general; Littleton and other of the old hence it really includes brothers writers almost invariably use and sisters, as well as those the term in this sense.

The line of ancestry is classed as *ascending* or *descending*, taking the person proposed as the unit, and is further classified as *paternal* or *maternal*, according as the examination may lead through the father or the mother.

The following diagram will serve to illustrate the degrees of consanguinity according to the civil law:

DEGREES OF CONSANGUINITY ACCORDING TO THE CIVIL LAW.

(PATERNAL LINE.)



In actions of ejectment the degrees of consanguinity must often be resorted to in the settlement of disputed questions of inheritance, and where a plaintiff claims by descent from the last owner he is required to remove every possibility of title in another person in the line of descent, as no presumptions are admitted against the person in possession.⁶³

⁶³ Posey v. Hanson, 10 D. C. App. 496.

§ 371. **Rights of inheritance.**—The law of descent, as administered in the United States, depends almost wholly upon local statutes, this being one of the subjects that has been left to each state to regulate for itself. As a consequence, much diversity prevails and there are probably no two states in which the law is, in all respects, the same. The English canons of inheritance have long been rejected as unsuited to our conditions and the spirit of our laws, and the English precedents, while sometimes resorted to, are of persuasive authority only.

The old ideas of the common law respecting blood have in large measure been retained, however, and in trials of contested titles the fact of relationship is frequently the pivot upon which the case is made to turn. Except as the statute has modified the old law by permitting descents to persons in close affinity to the deceased, or to those who have been admitted to the juridical relation of adoption, lands of an intestate descend only to those who are of his blood. This term, once much restricted, is now given a broad interpretation and is generally construed to mean all persons who are descended from the same common ancestor. The old distinction of the whole and half blood is no longer recognized ⁶⁴ except in what are termed "ancestral estates," that is, estates that came to the intestate by gift, devise or descent from an ancestor, in which event, as a general rule, those only who are of the blood of such ancestor can inherit.⁶⁵ This latter seems to be a retention of the common-law principle which followed the line of the blood of the person first seized, the manifest intention being to preserve ancestral estates in the line of the blood whence they came.⁶⁶

The old rule of the exclusion of the half-blood, being founded upon a system of tenure that has no existence in the United

⁶⁴ This is generally a positive statute. See the following cases construing the terms. *Eatman v. Eatman*, 83 Ala. 478; *Barnes v. Loyd*, 37 Ind. 523; *Van Sickle v. Gibson*, 40 Mich. 170; *Hatch v. Hatch*, 21 Vt. 450; *Lynch v. Lynch*, 132 Pa. St. 422.

⁶⁵ *Coleman v. Foster*, 112 Ala. 506; *Amy v. Amy*, 12 Utah, 278;

Armington v. Armington, 28 Ind. 74; *Rowley v. Stray*, 32 Mich. 70; *Wheeler v. Clutterbuck*, 52 N. Y. 67; *Little v. Buie*, 58 N. C. 10; *Henszey v. Gross*, 185 Pa. St. 353.

⁶⁶ *Kelly v. McGuire*, 15 Ark. 555; *Childress v. Cutter*, 16 Mo. 24.

States, has been generally abrogated by statute and even where express statutory provision for an equal participation has not been made courts have construed the legislative intention so as to include all who partake of the blood of the intestate. With the single exception above noted, relatives of the half blood inherit equally with those of the whole blood in the same degree,⁶⁷ and in those states where the doctrine of ancestral estates still obtains it is generally limited in its operation to the immediate ancestor from whom the intestate received the inheritance, devise or gift.⁶⁸ The solution of particular questions, depending upon special facts, will often present great difficulties, however, and from the diverse character of many of the statutes no very specific rules can be formulated that shall be of uniform application. The broad statements above made are about all that can be asserted with certainty and local statutes and judicial interpretations must be resorted to in all cases of doubt.

A widow is never an heir of her deceased husband⁶⁹ unless made so by statute,⁷⁰ but in a number of states this has been done⁷¹ and in such states she takes subject to the same rules of property as apply to other heirs.⁷²

§ 372. *Line of succession.*—It is laid down in the ancient books that when a party claims by descent he must prove that the ancestor from whom he derives title was the person last seized of the lands in question, and that he, the claimant, is his heir.⁷³ Under the application of this rule it was not sufficient to be the heir of the person who last had the right to the land

⁶⁷ *State v. Wyman*, 59 Vt. 527; *Cox v. Clark*, 93 Ala. 400; *White v. White*, 19 Ohio St. 536; *Elder v. Bales*, 127 Ill. 425; *Barnes v. Loyd*, 37 Ind. 523; *Van Sickle v. Gibson*, 40 Mich. 170.

⁶⁸ *Wheeler v. Clutterbuck*, 52 N. Y. 67; *Delaplaine v. Jones*, 8 N. J. L. 419; *Clark v. Shaller*, 46 Conn. 119; *Oliver v. Vance*, 34 Ark. 564; *Curran v. Taylor*, 19 Ohio, 36; *White v. White*, 19 Ohio St. 531. But see *Lewis v. Gor-*

man, 5 Pa. St. 164; *Ranck's Appeal*, 113 Pa. St. 98.

⁶⁹ *Townsend v. Radcliff*, 44 Ill. 446; *Tillman v. Davis*, 95 N. Y. 17.

⁷⁰ *Rotch v. Loring*, 169 Mass. 190.

⁷¹ *May v. Fletcher*, 40 Ind. 577; *Dodge v. Beller*, 12 Kan. 524.

⁷² *Wilcke v. Wilcke*, 102 Iowa, 173, 71 N. W. 201. And see *Wilkins v. Walker*, 115 Ala. 590.

⁷³ *Co. Litt.* 11; 2 *Blk. Com.*

but the actual seizin, or legal possession, and the seizin of the ancestor was required to be proved, in such cases, by showing that he was either in the actual possession of the premises, at the time of death, or in the receipt of the rents and profits thereof.⁷⁴ But this rule, while it was permitted to have an operation during the early stages of the remedy in this country,⁷⁵ never seems to have been adopted in a majority of the states and has long been denied in all. Every possible right or title in land which the ancestor may have possessed, whether accompanied by actual seizin or possession, or not, is now rendered transmissible by inheritance, with the exceptions heretofore noted of estates for years, which are generally treated as chattels, and estates for his own life.⁷⁶ The term "seizin" is however, a most convenient and compendious expression to indicate ownership, or the possession of rights, and for this reason it has been retained in modern law as a general designation of proprietary interests and in this sense it is used in the present work.

Where a party claims as a lineal heir he must prove a lawful descent from the ancestor whose rights he assumes to assert, and to accomplish this he must show; (1) the death of the ancestor and lawful seizin or right to the possession in him of the subject-matter of the title at the time of such decease; (2) the marriage of his parents, and (3) proof of his own legitimacy. If he claims as collateral heir he must show the descent of himself, and the person last seized or entitled, from some common ancestor, together with the extinction of all those lines of descent which would claim before him. This may be accomplished by proving the marriages, births and deaths, necessary to complete the devolution of his title, and showing the identity of the several parties. Thus, let us suppose that A, the claim-

208; *Adams' Eject.* *240. This would also seem to have been the early American rule. See 2 *Green. Ev.* § 309.

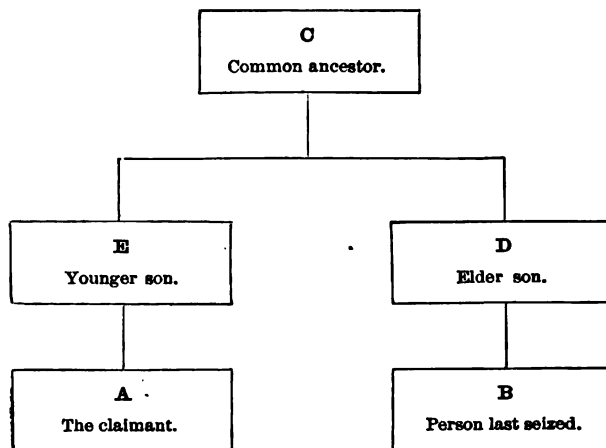
⁷⁴ This rule, it is said, grew out of the feudal doctrine which required the heir to be of the blood of the first purchaser, and the seizin of the last possessor

was regarded as presumptive evidence of this fact. See *Co. Litt.* 14; *Wat. Descent*, 65.

⁷⁵ *Greenleaf* announces the same rule. See 2 *Green. Ev.*, § 309.

⁷⁶ *Bates v. Shroeder*, 13 *Johns. (N. Y.)* 260; *Williams v. Amory*, 14 *Mass.* 20.

ant, and B, the person last seized, were cousins, descended from a common ancestor C; that B was the only child of D, the elder son of C, and A the only child of E, the younger son of C. In such a case A must prove the marriage of C, the birth and marriage of D, the birth, marriage and death of E, the birth and death without issue of B, and his own birth; for it is a maxim of law, that he who asserts the death of another, who was once shown to be living, must prove same.⁷⁷ The following diagram will serve to make clearer the proposition just stated:



§ 373. **Ancestral estates.**—The general doctrine of ancestral estates is, that where an intestate leaves an estate derived by gift, devise or descent from one of his own ancestors no person who does not partake of the blood of such ancestor shall be permitted to inherit same. As before remarked, we must seek for the origin of this doctrine in the early development of the common law. It is distinctly a survival of old feudal ideas with respect to successions and particularly of that which required an heir to be of the blood of the first purchaser. It is contended in some modern decisions that the doctrine is

⁷⁷ 2 Blk. Com. 208; Adams' N. H. 491; Spriggs v. Moale, 28 Eject. 253; Emerson v. White, 29 Md. 497; Davidson v. Wallingford, 88 Tex. 619.

further based in legal reason, and that there is an apparent injustice in permitting the descent of property to any one not related by the tie of consanguinity to him or her from whom it came, but this view is constantly being restricted and, in some states, seems to have been denied.

Where the rule prevails, and it finds some expression in nearly all of the states, in determining a descent and arriving at the persons who may take, all of the kindred of decedent must be omitted from consideration who are not also kindred of the ancestor from whom the estate is derived.⁷⁸ Thus, if a child inherits land from its mother and dies without issue, it will descend to its brothers and sisters, to the exclusion of the father, because he is not of the blood of the mother.⁷⁹ So, too, in the case of relatives of the half-blood who are not of the blood of the person from whom their intestate derived his estate.⁸⁰ Thus, let us say that A marries B, by whom he has issue C and D, when B dies; thereafter A marries E, by whom he has issue F, and thereafter C dies intestate and without issue, leaving him surviving his whole brother D and his half brother F, his only heirs at law and next of kin. In such event the title to so much of his lands as were acquired through descent from his mother would vest in D to the exclusion of F, he not being of the blood of the ancestor from whom the lands were derived. The diagram on page 404 will serve to make the proposition more clear.

§ 374. **Evidence of pedigree.**—The several stages by which one person connects himself with an ancestor, or through which he establishes the fact of relationship, is called *pedigree*. We may therefore define pedigree as the history of family descent. The links of a chain of pedigree are all substantive facts which must be established by proper proof to enable an heir to assert a valid claim to an ancestral estate. But, owing to

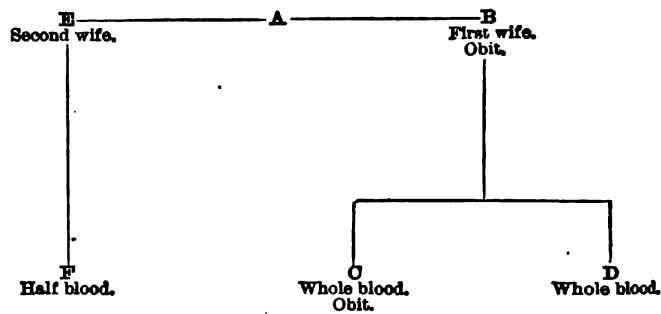
⁷⁸ See *Beard v. Mosely*, 30 Ark. 517; *Johnson v. Lybrook*, 16 Ind. 473; *McWilliams v. Ross*, 46 Pa. St. 369; *Wheeler v. Clutterbuck*, 52 N. Y. 67; *Campbell v. Ware*, 27 Ark. 65.

⁷⁹ *Tillinghast v. Coggeshall*, 7

R. I. 383; *Churchill v. Reamer*, 8 Bush (Ky.), 256.

⁸⁰ *Armington v. Armington*, 23 Ind. 74; *Ryan v. Andrews*, 21 Mich. 229; *Eastman v. Eastman*, 83 Ala. 478; *Perkins v. Simonds*, 28 Wis. 90. And see *Hulme v. Montgomery*, 31 Miss. 105.

the difficulty of producing living witnesses to prove remote events, questions of pedigree are often made an exception to the general rule of evidence which excludes hearsay,⁸¹ and, while the cardinal rule that the best evidence of which the case



in its nature is susceptible must always be produced still holds good, direct evidence of the facts is not always required. Family history is transmitted in various ways by both oral and written declarations, and unless proved by hearsay, it cannot, in many instances, be proved at all. For these reasons a liberal course is always pursued and much that is pure hearsay will be received to prove family relationship and to establish the facts of marriages, births and deaths, as well as other matters necessarily resulting from those events.⁸²

Declarations of deceased members of a family, made *ante litem motam*, that is, before the suit was commenced, are generally received, provided it is shown that the declarant is dead,⁸³ and the same course will be pursued where it satisfactorily appears that the person making such declarations, although living, is incompetent, or beyond the jurisdiction of the court.⁸⁴ It is further essential that the declarant be shown to have been

⁸¹ *Methemy v. Bohn*, 160 Ill. 263.

⁸² *Eisenlord v. Clum*, 126 N. Y. 552, 27 N. E. Rep. 1024; *Young v. Shulenberg*, 165 N. Y. 385, 59 N. E. Rep. 135; *Fowler v. Simpson*, 79 Tex. 611, 23 Am. St. Rep. 370; *Wise v. Wynn*, 59 Miss. 590;

Cuddy v. Brown, 78 Ill. 415; *Methemy v. Bohn*, 160 Ill. 263; *Fulkerson v. Holmes*, 117 U. S. 395.

⁸³ *Methemy v. Bohn*, 160 Ill. 263.

⁸⁴ *Young v. Shulenberg*, 165 N. Y. 385, 59 N. E. Rep. 135.

a member of the family,⁸⁵ and this by evidence independent of his own statements,⁸⁶ but the relationship may be either by blood or marriage.⁸⁷ Slight proof of the relationship is required, however, as this fact, in many instances, will be as difficult to establish as the very fact in controversy.⁸⁸

Recitals in an ancient deed, have been permitted to be given as against persons who are not parties to it and who do not claim under it.⁸⁹ Entries in a family bible or other records of family history are generally received,⁹⁰ particularly when shown to have been made by a deceased relative, and, when necessary, recourse may be had to tombstones and other funeral monuments.⁹¹ In the latter case the admission of an inscription is made to rest on the presumption that it was placed on the stone by some member of the family having knowledge of the fact stated, as well as upon the further presumption that it would not be permitted to remain if erroneous.⁹² It would seem, however, that unlike oral declarations concerning pedigree it is not essential to the admissibility of an inscription that it shall appear to have been made by a member of the family since deceased. It is enough to show the fact of such inscription and of what it consists, and this may be proved by secondary evidence.⁹³ The reason for this would seem to be that the publicity of the fact supplies the defect of proof.

It is said that cases of pedigree are peculiar in that they depend almost exclusively upon presumption, which is a process of probable reasoning from facts established or judicially noticed,⁹⁴ and while presumptions should be weighed with care

⁸⁵ *Jackson v. King*, 5 Cow. 237, 15 Am. Dec. 468.

⁸⁶ *Greene v. Almand*, 111 Ga. 735, 36 S. E. Rep. 957.

⁸⁷ *Fowler v. Simpson*, 79 Tex. 611, 23 Am. St. Rep. 370, 15 S. W. Rep. 682; *Chapman v. Chapman*, 2 Conn. 347.

⁸⁸ *Fulkerson v. Holmes*, 117 U. S. 389.

⁸⁹ *Greenleaf v. Brooklyn, etc. Ry. Co.*, 132 N. Y. 408, 30 N. E. Rep. 762.

⁹⁰ *Campbell v. Wilson*, 23 Tex. 252; *Insurance Co. v. Pollard*, 94 Va. 146.

⁹¹ *Smith v. Patterson*, 95 Mo. 525, 8 S. W. Rep. 567.

⁹² See *North Brookfield v. Warren*, 16 Gray (Mass.), 174; *Eastman v. Martin*, 19 N. H. 152.

⁹³ *Boyett v. State*, 130 Ala. 77, 89 Am. St. 19, 30 So. Rep. 475.

⁹⁴ *Best, Evidence*, 411.

and applied with caution in all cases, yet, where remote transactions are involved, necessity may compel their use in order to prevent a failure of justice.⁹⁵

§ 375. Continued—Family records.—Among the kinds of hearsay, which the law permits to be given in support of a pedigree or to prove the facts of relationship, are entries made in a bible or other religious book. As a general rule any book, document or paper, containing entries made by a parent or other relative, pertaining to the facts of birth, marriage or death, and the times when these events happened, may be offered in evidence and the entries will be taken as declarations of the person making them.⁹⁶

But such evidence is admissible only when the fact sought to be established cannot be otherwise shown,⁹⁷ as that the person by whom the entries were made is dead,⁹⁸ and that no living witnesses conversant with the facts can be found.⁹⁹ In all cases, if the declarant is living,¹ and within reach of process,² such entries stand on no higher footing than other declarations and are entitled to no greater consideration, and, under the rule excluding secondary evidence when primary evidence can be obtained, will be refused if offered.³

It is sometimes asserted that the entries must have been made by a deceased parent or other relative and that they are admitted largely on the grounds of the interest of the declarant in a matter of family relationship.⁴ It is undoubtedly true that when this is shown they derive additional weight from the fact that they are the acts or declarations of persons who must be presumed to have known the truth of the

⁹⁵ *Young v. Shulenberg*, 165 N. Y. 385.

⁹⁶ *Kelly v. McGuire*, 15 Ark. 555; *Cherry v. State*, 68 Ala. 29; *Chapman v. Chapman*, 2 Conn. 347; *Greenleaf v. Railway Co.*, 30 Iowa, 301; *Jones v. Jones*, 45 Md. 144; *Hunt v. Johnson*, 19 N. Y. 279; *Pearce v. Kyzer*, 16 Lea (Tenn.), 521; *Campbell v. Wilson*, 23 Tex. 252.

⁹⁷ *People v. Mayne*, 118 Cal.

516; *Campbell v. Wilson*, 23 Tex. 252.

⁹⁸ *Dupoyster v. Gagani*, 84 Ky. 403.

⁹⁹ *Leggett v. Boyd*, 3 Wend. (N. Y.) 376.

¹ *People v. Sheppard*, 44 Hun (N. Y.), 565.

² *Campbell v. Wilson*, 23 Tex. 252.

³ *Dobson v. Cothran*, 34 S. C. 518.

⁴ *Cherry v. State*, 68 Ala. 29.

matters stated,⁵ and it has been held that where the book is produced without evidence to show when, or by whom, or under what circumstances, the entries were made, they are entitled to but little consideration.⁶ But, while evidence of this kind is governed by the same general rules that apply to verbal declarations of the same facts, yet a family bible, or other book of a religious nature, in which entries of family history are made, is regarded much in the nature of a record and by reason of its formality an entry therein is entitled to greater weight than would be a similar verbal declaration.⁷ Such entries, in a proper sense of the term, are family acknowledgments. They are supposed to be open to all members of the family and hence known and acquiesced in. Because of this publicity it is immaterial that they should have been made by a relative.⁸ It has been said, that to require proof of the handwriting or authorship of the entries in a family bible is to mistake the distinctive character of the evidence, which derives its value, not from the fact that the entries were made by any particular person, but, that being in that place as a family register they are to be taken as assented to by those in whose custody the book has been kept. Where this view prevails it would seem that it is only necessary to produce the book, prove that it is the family bible, and show that it has come from proper authority.⁹

The general rule respecting declarations, that is, that they must be made *ante litem motam*, would seem to apply to entries of the kind now under consideration. Hence, it has been held that they must be made either at the time the event happens or at some other period so remote that it shall appear that they were not made for the purposes of the suit or with a view to litigation.¹⁰

§ 376. Continued—Church and parish records.—It does not seem that the subject of parish records, kept pursuant to

⁵ See *Pearson v. Pearson*, 46 Cal. 609; *Pearce v. Kyzer*, 16 Lea (Tenn.), 521; *Greenleaf v. Dubuque, etc. Ry. Co.*, 30 Iowa, 301.

⁶ *Amey v. Cockey*, 73 Md. 297.

⁷ *People v. Mayne*, 118 Cal. 516.

⁸ *Campbell v. Wilson*, 23 Tex. 252; *Jones v. Jones*, 45 Md. 144; *People v. Ratz*, 115 Cal. 132.

⁹ *People v. Ratz*, 115 Cal. 132.

¹⁰ *Chapman v. Chapman*, 2 Conn. 347.

ecclesiastical authority, has been much considered in the United States, although in England such records have long been resorted to in the settlement of doubtful questions of pedigree. It will be remembered, however, that in England the church is an integral part of the state, and, hence, a parish record partakes of a civic as well as an ecclesiastical character. For this reason only the entries made in registers and records of churches of the established religion were formerly admitted in evidence. This was the rule until very recent years, but at present all registers, whether of the established or dissenting churches, are upon the same footing.

In this country, while there is not much authority upon the subject, the analogies and reasons which apply to other presumptively correct documents would seem to apply to entries of this kind. Parish registers have been held to serve a purpose equivalent to that served by family records, and to be entitled to the same consideration as corporate records, or other documents of a similar character, which are generally received as evidence of such matters as are recorded in the usual course of affairs.¹¹ This principle seems to have been recognized at quite an early day,¹² and has been applied in a number of cases.¹³

§ 377. Continued—Marriage certificates.—The exact evidentiary value of a certificate of marriage, given by the officiating minister or magistrate, is not altogether well settled. When properly authenticated such a certificate is always received in evidence as a proof of the fact of marriage, but in questions of pedigree it does not seem that the same degree of strictness is required as obtains in other proceedings, particularly those of a criminal or *quasi*-criminal nature. While a paper of this kind does not authenticate itself, and hence requires extraneous proof, yet this, as a general proposition, may

¹¹ See *Hunt v. Chosen Friends*, 64 Mich. 671, 8 Am. St. 855; *Durfree v. Abbott*, 61 Mich. 471; *Lewis v. Marshall*, 5 Pet. (U. S.) 470; *Jackson v. Boneham*, 15 Johns. (N. Y.) 226.

¹² *Hyam v. Edwards*, 1 Dall. (U. S.) 2.

¹³ In *Lewis v. Marshall*, 5 Pet. (U. S.) 470, entries of burial in a church in Philadelphia were held admissible in a land controversy in Kentucky, the case being tried in one of the courts of the United States.

consist of very slight circumstances. Thus, it has been held that such a certificate is admissible in evidence without express proof that it was signed by the person who performed the ceremony, where it is shown that the parties were married in a church and there received the certificate, the presumption in such case being that the signature attached thereto is genuine and was appended by the person performing the ceremony.¹⁴ In some states, from the earliest times, the practice has been to receive as evidence the certificate itself, just as it was issued to the party, signed by the magistrate or other person performing the ceremony, but without other authentication.¹⁵ The practice, it is said, is founded on the distinction between a certificate issued to evidence a fact and an ordinary copy from the records of a magistrate. In the latter case the document is a mere copy from a record preserved by the magistrate, and would, of course, require authentication in the usual form. In the former the certificate is in the nature of an original document, and notwithstanding there may be back of it a record preserved by the official issuing the certificate, yet this will not destroy its character as original evidence nor call for other proof beyond what may be necessary to show that it is genuine.¹⁶

§ 378. Continued—Oral declarations.—The rule is well established that in an issue with respect to descent or relationship, particular facts, such as births, marriages, and deaths, may be proved by hearsay evidence, consisting of the oral declarations of persons, since deceased, who from their situation were likely to know such facts.¹⁷ It is a further rule that such testimony is as competent to prove a negative as an affirmative.¹⁸ The declarations in such cases are not strictly con-

¹⁴ *Fratini v. Caslini*, 66 Vt. 273.

¹⁵ *Northrop v. Knowles*, 52 Conn. 522; *Hutchins v. Kimmell*, 81 Mich. 126.

¹⁶ *Northrop v. Knowles*, 52 Conn. 522; *State v. Melton*, 120 N. C. 591.

¹⁷ *Washington v. Bank*, 171 N. Y. 166, 89 Am. St. 800, 63 N. E. Rep. 381; *Malone v. Adams*, 113 Ga. 791, 84 Am. St. 259, 39 S. E.

Rep. 507; *Shorten v. Judd*, 56 Kan. 43; *Fulkerson v. Holmes*, 117 U. S. 395.

¹⁸ *Washington v. Bank*, 171 N. Y. 166. In this case it was held that the declarations of a decedent that she had no children or relatives, was admissible to prove the non-existence of heirs or next of kin of such deceased.

fined to births, marriages, and deaths, but extend to an inquiry necessarily involving these events, or which tend to show that either some, or all of them, occurred or did not.¹⁹

In many cases where resort is had to the oral declarations of deceased persons the attempt is to set up some right derived through the declarant and to establish such right by his own statements as to the pedigree of the family of which he claimed to be a member. This, it seems, cannot be done without precedent proof from other sources that the declarant was what he claimed to be. Thus, the children of A will not be permitted to take an interest in the estate of B by virtue alone of their father's statement that B was his brother. This is simple conformity to the old and well established rule. But an interesting question is presented when the case is reversed and the claimant seeks to reach the estate of the declarant by evidence of what he said with reference to his family and kindred. While it is conceded that the children of A cannot establish a right to the estate of B by proof alone that A declared in his lifetime that B was his brother, may they yet do so by showing that B himself so declared? It would seem that this question has not been mooted to any extent in this country, but in the few cases where it has been presented the answer has been that they can.²⁰ In support of this position it is contended that such statements stand upon much the same footing as declarations against interest and are admissible for the same reasons, but the better and perhaps truer ground is, that to deny them effect would often result in a failure of justice. Therefore we may now regard the rule as fairly established, that the declarations of a decedent whose estate is in controversy, that he was related to one who claims such estate, are admissible in evidence without other proof of the fact of relationship.²¹

¹⁹ Russell v. Schuyler, 22 Wend. (N. Y.) 279.

²⁰ In Moffit v. Witherspoon, 10 Ired. (N. C.) 185, persons who claimed to be the nephews and nieces of a Mrs. Donahoe, in an action of ejectment brought after her death to recover certain lands belonging to her in

life, were permitted to prove that she had declared, many years before her death, that the mother of the claimants was her only sister, and no other proof than this seems to have been offered.

²¹ Cuddy v. Brown, 78 Ill. 415; Moffit v. Witherspoon, 10 Ired.

§ 379. **Proof by court records.**—We have in this country a system of proof of heirship and pedigree which does not seem to have been contemplated by the old cases, and which will frequently dispense with the more difficult and cumbersome forms of proof discussed in the preceding paragraphs. This method consists in the production of the adjudications and findings of courts where the matters of heirship and pedigree were directly presented and passed upon. Thus, it is a practice in most of the probate courts to require a proof of heirship in the settlement of the estates of decedents and upon this proof the court makes a judicial finding as to who are the heirs of the deceased person whose estate is being administered. While this finding is made primarily for the purpose of determining the next of kin of the deceased, as an aid to the administrator in the distribution of personal property, its effect is also to fix the *status* of those who succeed to the decedent's realty, and being a solemn judicial act it is available in subsequent controversies between the heirs or where the rights of the heirs are invaded by strangers. So, too, in some forms of action in other courts a proof of heirship becomes an essential circumstance and when the facts are found and preserved by adjudication the decree may be used as proof in other actions in which the question of heirship is involved.

The foregoing remarks find an illustration where title to land is deduced through a decree of partition dividing land between the heirs of a deceased owner. In such a case the adjudication of the court, finding who were the heirs-at-law of the deceased owner, is *prima facie* evidence of the facts recited. Its effect is to establish the facts of heirship and ownership of the interests decreed to be sold, and, in an action of ejectment brought by the purchasers against a stranger to the partition suit, the plaintiff is not bound to produce evidence of heirship outside of such decree, in the absence of proof to the contrary. The doctrine that judgments and decrees are evidence only in suits between parties and privies has no application to such a case.²²

(N. C.) 185; *Adie v. Commonwealth*, 25 Gratt. (Va.) 712; *Malone v. Adams*, 113 Ga. 791, 39 S. E. Rep. 507, 84 Am. St. 259.

Wise v. Wynn, 59 Miss. 590;

²² *Whitman v. Heneberry*, 73 Ill. 109.

§ 380. **Proof of marriage.**—As the right of inheritance accrues only to the issue of lawful wedlock, except as otherwise provided by statute, it devolves upon the party claiming title by descent to show the marriage of his own parents and frequently that of other of the ancestors through or under whom he claims. This issue is proved either by direct evidence of the fact or inferentially by collateral circumstances. Where it can be shown by the testimony of the eye-witnesses of the event this is the preferable mode of making proof. The testimony of the celebrant of the marriage,²³ or of witnesses who were present at the celebration,²⁴ is the best evidence that can be produced, but a certificate of the minister or other officiating officer,²⁵ accompanied by evidence showing the identity of the parties and the assumption by them of marital rights and obligations is probably as good for all practical purposes, while certified copies of the marriage register or entries in the books kept pursuant to law or the requirements of the body under whose authority the celebrant acted,²⁶ are frequently resorted to and received in the absence of better evidence.²⁷

Nor is it necessary, as a rule, to establish the marriage contract by direct or even by documentary evidence. All of the presumptions of law are in favor of marriage and legitimacy, and usually it will be sufficient to show such facts as naturally lead to the conclusion that a marriage has actually taken place.

²³ *State v. Goodrich*, 14 W. Va. 884; *People v. Imes*, 110 Mich. 250.

²⁴ *Fleming v. People*, 27 N. Y. 329; *Brewer v. State*, 59 Ala. 101; *State v. Williams*, 20 Iowa, 98; *Patterson v. Gaines*, 47 U. S. 550; *People v. Imes*, 110 Mich. 250; *McQuade v. Hatch*, 65 Vt. 482.

²⁵ Marriage may be proved by the marriage certificate itself, just as it was issued to the parties, signed by the officer performing the ceremony and without other authentication. *Northrop v. Knowles*, 52 Conn. 522.

And such proof will be sufficient in case of a foreign marriage without proving the foreign law upon the subject. *Hutchins v. Kimmel*, 31 Mich. 126.

²⁶ The statute usually makes some provision for the celebration of marriages but statutory forms, both with respect to ceremony and celebrants, are directory only and not prohibitory of other methods, unless specially so provided. *Harris v. Harris*, 8 Ill. App. 57.

²⁷ *Groom v. Parables*, 28 Ill. App. 152; *Maxwell v. Chapman*, 8 Barb. (N. Y.) 579.

Hence, the acknowledgment of the parties, their conduct toward each other, and the general reputation consequent upon their cohabitation, may all be considered.²⁸ And when it is shown that a man and woman have lived together in an apparent marriage relation, that they have been accepted and treated as man and wife by the community in which they resided, this will be taken as *prima facie* evidence of the fact that they were what they professed to be.²⁹ The law presumes, from considerations of decency and public well being, that every competent couple who ostensibly cohabit as husband and wife, demeaning themselves toward each other as such, and who are received into society and treated by friends and relatives as entitled to that *status*, have been legally married,—especially when the legitimacy of the offspring is the issue for judgment.³⁰ As a rule, proof of actual marriage by direct evidence is required only in criminal proceedings, as prosecutions for bigamy, etc., or in actions for criminal conversation.

At the present time official records of births, deaths, and marriages, are kept pursuant to law in most of the states, and copies of such records or certificates of the facts by the officer in whose custody such records are placed, are received as evidence of such births, deaths and marriages whenever the facts are called in question. It has been held that where it is

²⁸ Thorndell v. Morrison, 25 Pa. St. 326; Harman v. Harman, 16 Ill. 85; Jones v. Gilbert, 135 Ill. 27; Redgrave v. Redgrave, 38 Md. 93; Chamberlain v. Chamberlain, 71 N. Y. 423; Jones v. Reddick, 79 N. C. 290; Cox v. Rash, 82 Ind. 520; Ruffino's Estate, 116 Cal. 304.

²⁹ Miller v. White, 80 Ill. 580; State v. Schweitzer, 57 Conn. 532; Redgrave v. Redgrave, 38 Md. 93; Hynes v. McDermott, 91 N. Y. 459; White v. White, 82 Cal. 427; Cox v. Rash, 82 Ind. 520.

³⁰ Arnold v. Cheesebrough, 85 Fed. Rep. 833. Marriage is presumptively proved by evidence that a man kept house with a

woman whom he called his wife; that he introduced her into the community where he lived as such; that he received friends and relatives as a married man, and visited them with his wife as such, and was generally known and respected as a married man; that he had children, who were christened as the offspring of such cohabitation, taking his name, and who were generally looked upon as legitimate, where there are no facts and no partial or general reputation in the community to show such cohabitation illicit. Bothick v. Bothick, 45 La. Ann. 1382, 14 So. Rep. 293.

shown that no certificate of an alleged marriage was ever filed, in a state requiring the celebrant of a marriage to file such certificate within a specified period after the marriage, a strong presumption is raised that no marriage took place.³¹

§ 381. Continued—General reputation.—As previously shown, direct proof of marriage is not essential to the maintenance of rights of inheritance, and, in many cases, such proof cannot be produced. In such event evidence of cohabitation, and of repute during the lives of the persons whose marital relations are in question, will be sufficient, in the absence of proof to the contrary, to prove a contract of marriage between them.³² This will always be the rule in cases where no question of public offense is involved,³³ and about the only limitation that is placed upon it is, that the reputation must be general,³⁴ and the cohabitation must have been matrimonial in its inception.³⁵

Where direct evidence of marriage is offered, general reputation to the contrary is wholly inadmissible. While general reputation, in connection with other circumstances, is admissible to prove a marriage it does not follow that the same kind of evidence may be resorted to for the purpose of disproving it, for were this the case then a marriage solemnized according to all the forms of law might, in effect, be nullified by the mere speech of people.³⁶ Reputation, in the absence of better evidence, may often be resorted to as primary proof of an existing state or relation, but, as a rule, cannot be shown to prove a mere negation, and where the question in dispute is marriage

³¹ *Henry v. McNealy*, 24 Colo. 456, 50 Pac. Rep. 37.

³² *Green v. State*, 59 Ala. 68; *Miller v. White*, 80 Ill. 580; *Henderson v. Cargill*, 31 Miss. 367; *Procter v. Bigelow*, 38 Mich. 282; *Buddington v. Munson*, 33 Conn. 481; *Redgrave v. Redgrave*, 38 Md. 93; *Bowers v. Van Winkle*, 41 Ind. 432; *White v. White*, 82 Cal. 427, 7 L. R. A. 799.

³³ *White v. White*, 82 Cal. 427, 7 L. R. A. 799.

³⁴ *Brinkley v. Brinkley*, 50 N. Y. 198.

³⁵ *Barnum v. Barnum*, 42 Md. 251; *Clayton v. Wardell*, 4 N. Y. 230; *Cartwright v. McGown*, 121 Ill. 338, 10 West. 589; *Commonwealth v. Stump*, 53 Pa. St. 132; *Wallace's Case*, 49 N. J. Eq. 530. 25 Atl. Rep. 260; *Stans v. Balter*, 9 Wash. 115, 37 Pac. Rep. 316; *Williams v. Herrick*, 21 R. I. 401, 43 Atl. Rep. 1033.

³⁶ *Northrop v. Knowles*, 52 Conn. 522.

it meets the further objection that the law presumes in favor of marriage and the legitimacy of offspring.⁸⁷

§ 382. Continued—Divided reputation.—Where a marriage is attempted to be established by reputation only it would seem that the opposing party may be allowed to weaken the evidence by showing that the reputation was not general, or that it was divided, but even in such cases the negative evidence must be confined within very narrow limits,⁸⁸ and, in some cases, it has been wholly excluded.⁸⁹ But, when courts employ the term “divided reputation” it is not meant that an individual can have such a thing as two opposite general reputations at the same time. No reputation of marriage but a general reputation is competent to establish the relation, and general reputation, whether affirmative or negative, is a fact to be proved, like any other fact within the knowledge of the witness. When parties are generally reputed to be man and wife, the general reputation thus asserted is a fact. A divided reputation, which is but the result of conflicting evidence as to general reputation, is not a distinct, substantive, provable fact, for it is a mere deduction made from proved facts. Hence, while it may be permissible to introduce testimony, the effect of which may be to induce such deduction, yet it would be highly improper to attempt to prove the same as a fact by asking a witness whether there is a divided reputation.

A reputation, to be provable at all, must be a general reputation. It may be either one of two opposites, but it cannot be partly one and partly the other, for, in such case, there would be no general reputation either way. A man and a woman may be generally reputed to be married, or the general assertion may be to the contrary, but, in either event, it is an existing fact, and it is this fact of general reputation, and none other, that the law permits to be shown by evidence. If a witness called to prove or disprove the fact of marriage knows the general reputation of the parties he may testify thereto. But

⁸⁷ *Marble v. Marble*, 36 Mich. 386; *Clement v. Kimball*, 98 Mass. 536; *Badger v. Badger*, 88 N. Y. 547.

⁸⁸ *Northrop v. Knowles*, 52 Conn. 522.

⁸⁹ *Badger v. Badger*, 88 N. Y. 547; *Marble v. Marble*, 36 Mich. 386; *Jackson v. Jackson*, 82 Md. 17.

unless he knows, or can say, that the parties have no general reputation in respect to their domestic relations he will not be permitted to testify that no general reputation exists. If there is a diversity of opinion respecting the *status* of the parties this is one of the means by which a witness may know there is no general reputation, but this means of knowledge, apart from the fact that there is or is not a general reputation and as a totally independent circumstance, is a thing not to be proved.⁴⁰

§ 383. **Validity of marriage.**—As we have seen, inheritance accrues only to the issue of *lawful* wedlock, therefore, in all cases of succession, the inquiry is directed not only to the fact of marriage but to the validity of such marriage as well. As a general and universally received proposition, a marriage which is valid by the laws of the place where it is celebrated is valid everywhere, and, of necessity, the offspring of such marriage will be treated as legitimate wherever the marriage itself would be regarded as valid.⁴¹ This is a generally recognized principle of the law of nations. To this general rule there are a few exceptions, as where the marriage involves a breach of conventional usages which directly effects the morals or good order of society, or where it contravenes express prohibitory and invalidating words of the statute.⁴² But the exceptions are few, consisting mainly of cases of incest, polygamy, and other matters which offend against received standards of morals. In some states miscegenation is included in the prohibition of the statute.⁴³ Where such marriages are denounced by positive state policy, then, however they may be regarded elsewhere, they would, in such states, be treated as invalid.⁴⁴ These questions are seldom presented, however, and the uniform tendency of the courts is to uphold the validity of the relation whenever it becomes an issue and so strenuously is this prin-

⁴⁰ *Jackson v. Jackson*, 82 Md. 17, 34 L. R. A. 773; *Brinkley v. Brinkley*, 50 N. Y. 199; *White v. White*, 82 Cal. 427.

⁴¹ *Jackson v. Jackson*, 82 Md. 17, 34 L. R. A. 773; *Besse v. Pellochoux*, 73 Ill. 285; *Hicks v. Skinner*, 71 N. C. 539; *Van Voorhis v. Brintnall*, 86 N. Y. 18.

⁴² *Cook v. Cook*, 144 Mass. 163; *Cartwright v. McGown*, 121 Ill. 388; *Scott v. Scott*, 39 Ga. 321.

⁴³ See *Jackson v. Jackson*, 82 Md. 17, 34 L. R. A. 773; *State v. Kennedy*, 76 N. C. 251.

⁴⁴ *Greenhow v. James*, 80 Va. 636. And see *Norman v. Norman*, 121 Cal. 620.

ciple maintained that it has been held that even where the parties, being residents of one state, go into another state where their marriage is valid, and are there married, such marriage will be recognized on their return to the place of their original residence.⁴⁵ This will generally be the case where the statutory prohibition in respect to marriage relates to form, ceremony, and qualification merely,⁴⁶ but where the prohibition is expressive of a decided state policy as a matter of morals, the question becomes one of difficulty and not a little uncertainty. Indeed it is almost impossible to reconcile some of the decisions with the plain and long settled rules of law respecting the legitimacy of offspring and rights of property, while not a little of the discussions, in many cases, does not rise above the level of sentimental gush.

The general rule is as first stated, and when a marriage in fact is shown the law raises a strong presumption in favor of its legality. In such event the burden is cast upon the party objecting to its validity to prove such facts and circumstances as will establish its invalidity.⁴⁷

In like manner, a marriage dissolved in the manner and for the causes allowed by the law of the parties domicile, if effected in due course of law, must be regarded everywhere as a valid dissolution of the bond of matrimony.⁴⁸

§ 384. **Presumptions of marriage.**—When the fact of marriage has been established by any competent evidence it will be presumed to have been valid;⁴⁹ and the burden of showing invalidity will devolve upon the party objecting thereto.⁵⁰

⁴⁵ *Smith v. Smith*, 52 N. J. L. 312; *Medway v. Needham*, 16 Mass. 157; *Van Voorhis v. Brintnall*, 86 N. Y. 18. And see *De Lane v. Moore*, 55 U. S. 14; *Smith v. Chapell*, 31 Conn. 589; *Dubois v. Jackson*, 49 Ill. 49.

⁴⁶ *Pennegar v. State*, 87 Tenn. 244.

⁴⁷ *Jones v. Gilbert*, 135 Ill. 27. Compare *Norman v. Norman*, 121 Cal. 620. In this case it was held that one who is married on the high seas, with the

avowed purpose of evading the laws of the state of his residence, has the burden of proving that there is a law on the high seas under which the marriage would be valid.

⁴⁸ *Barber v. Root*, 10 Mass. 260; *Harrison v. Harrison*, 20 Ala. 629.

⁴⁹ *Cartwright v. McGown*, 121 Ill. 388; *Thomas v. Thomas*, 124 Pa. St. 646; *Ward v. Dulaney*, 23 Miss. 410.

⁵⁰ *Jones v. Gilbert*, 135 Ill. 27;

But this presumption may be destroyed and the burden of proof will again shift and be thrown upon the party alleging the marriage.⁵¹ Thus, the celebration of a marriage is *prima facie* proof of everything necessary to the validity of same,⁵² the law supplying by presumption the essential secondary facts.⁵³ This evidence, however, may be overcome, or rebutted, by direct proof that any of the circumstances which the law renders necessary to validity were wanting.⁵⁴ Hence, it may be shown that either of the parties had a husband or wife living at the time,⁵⁵ or that they were within the prohibited degrees of consanguinity, or that one of the parties was *non compos mentis*.⁵⁶ In every instance, however, where the fact of marriage is shown, the law raises a strong presumption in favor of its legality and the concurrence of all the incidental circumstances that go to make a valid marriage.⁵⁷ Such presumption can be repelled only by the most cogent, convincing and satisfactory evidence to the contrary, and will never be broken in upon or shaken by a mere balance of probability, or other inconclusive reasoning.⁵⁸ The ceremony will always be presumed to have been performed by a competent person,⁵⁹ and in a manner sanctioned by law,⁶⁰ while the fact of solemnization raises the further presumption that the parties possessed sufficient capacity to contract and enter into the married relation.⁶¹

People v. Calder, 30 Mich. 85;
Fleming v. People, 27 N. Y. 329.

⁵¹ Cole v. Cole, 153 Ill. 585.

⁵² Cartwright v. McGown, 121
Ill. 396.

⁵³ Pratt v. Pierce, 36 Me. 448;
Hull v. Rawles, 27 Miss. 471;
People v. Calder, 30 Mich. 85;
Murphy v. State, 50 Ga. 150.

⁵⁴ Heffner v. Heffner, 23 Pa.
St. 104; Powell v. Powell, 27
Miss. 783; Cole v. Cole, 153 Ill.
585; United States v. Smith, 5
Utah, 273.

⁵⁵ Cartwright v. McGown, 121
Ill. 396.

⁵⁶ Weatherford v. Weatherford,
20 Ala. 548.

⁵⁷ State v. Abbey, 29 Vt. 60;

Fleming v. People, 27 N. Y. 329;
Patterson v. Gaines, 47 U. S.
550; Meyers v. Pope, 110 Mass.
314.

⁵⁸ Hynes v. McDermott, 91 N.
Y. 459; Johnson v. Johnson, 114
Ill. 611, 1 West. Rep. 620; Dixon
v. People, 18 Mich. 84; Meggin-
son v. Megginson, 21 Ore. 387.
14 L. R. A. 540.

⁵⁹ State v. Abbey, 29 Vt. 60;
Patterson v. Gaines, 47 U. S.
550; Goshen v. Stonington, 4
Conn. 219.

⁶⁰ Murphy v. State, 50 Ga. 150;
Lancat v. State, 98 Wis. 136;
Hutchins v. Kimmell, 31 Mich.
126.

⁶¹ Fleming v. People, 27 N. Y.

Where the fact of marriage is once shown the law raises a presumption of the continuance of the relation, but this presumption, like those previously discussed, may be overcome by proof of facts inconsistent with the idea of a continuity of the *status*.⁶²

§ 385. Continued—Death of former spouse.—The law thinketh no evil, therefore it will not presume that any one has committed an unlawful act. It is for this reason that when a marriage has been shown all of the intendments of law are in favor of its legality. So strong is this principle engrafted upon the law that in order to sustain the validity of a second marriage it will be presumed, in proper cases and in the absence of any showing to the contrary, that the former spouse is dead, the ordinary presumption in favor of the continuance of human life being made to yield to the stronger presumption in favor of the innocence of a second marriage.⁶³

§ 386. Presumption of divorce.—Another phase of the special subject discussed in the last paragraph is presented in those cases where a presumption of divorce is permitted to be raised in favor of the validity of a second marriage. Thus, where a woman contracts a second marriage while her first husband is alive, a legal divorce, before the second marriage was entered into, may be presumed, notwithstanding there is no direct evidence thereof.⁶⁴ In such event the burden of

329; *Coal Run Coal Co. v. Jones*, 127 Ill. 379.

⁶² Thus, where it is shown that the parties for more than thirty years have lived in different states and have had no communication with or knowledge of each other for more than ten years, while the alleged wife has for many years been living with another man as his wife and going by his name, the presumption of the continuance of a former marriage relation shown to have existed is overcome. *Canadian, etc. Co. v. Bloomer*, 14 Wash. 491.

⁶³ *Johnson v. Johnson*, 114 Ill.

611; *Yates v. Houston*, 3 Tex. 433; *Cash v. Cash*, 67 Ark. 278; *Dixon v. People*, 18 Mich. 84; *Hunter v. Hunter*, 111 Cal. 261; *Klein v. Laudman*, 29 Mo. 259.

⁶⁴ *Boulden v. McIntire*, 119 Ind. 574, 12 Am. St. 453; *Blanchard v. Lambert*, 43 Iowa, 228; *Johnson v. Johnson*, 114 Ill. 611; *Goldwater v. Burnside*, 22 Wash. 215. It is presumed that a first marriage was dissolved by a divorce where the husband contracted a second marriage and cohabited with his second wife in a locality where the first resided, and the second wife was introduced as such to the first,

showing that there has been no divorce is thrown upon the party who asserts the invalidity of the marriage.⁶⁵ The main objection to such a course is that it involves the proving of a negative, but it has frequently been held that where a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative.⁶⁶ Hence, where the right of a claimant to land rests upon the supposed illegality of a marriage, before he can make good that right, he must, by proper proof, remove every presumption of the legality of such marriage.⁶⁷ It is said, that the law does not impose upon every person contracting a second marriage the necessity of preserving the evidence that a former marriage has been dissolved, either by the death of their former consort or by a decree of court, and, usually, when it is shown that a marriage has been consummated in accordance with the forms of law, it is to be presumed that no legal impediments existed that would prevent the parties from entering into matrimonial relations. Hence, the fact, if shown, that either or both of the parties had been previously married, and, of course, at a former time had a husband or wife living, does not destroy the *prima facie* legality of the last marriage.⁶⁸ In such event the inference will be that the former marriage has been legally dissolved and the burden of showing that it has not will rest upon the party seeking to impeach the last marriage.⁶⁹

The foregoing doctrines are always applied in cases which directly involve moral turpitude, but the principles which they embody are equally applicable in civil suits in which moral tur-

and the first was introduced to a daughter of the second, in the absence of any protest or complaint by the first wife or other evidence negating a divorce. *Leach v. Hall*, 95 Iowa, 611, 64 N. W. Rep. 790.

⁶⁵ *Schmisser v. Beatrice*, 147 Ill. 215; *Wenning v. Teeple*, 144 Ind. 189.

⁶⁶ See *Goodwin v. Smith*, 72 Ind. 113; *Hull v. Rawls*, 27 Miss. 471.

⁶⁷ *Boulden v. McIntire*, 119

Ind. 574; *Klein v. Laudman*, 29 Mo. 259; *Harris v. Harris*, 8 Ill. App. 57; *Schmisser v. Beatrice*, 147 Ill. 210.

⁶⁸ *Coal Run Coal Co. v. Jones*, 127 Ill. 379; *Wenning v. Teeple*, 144 Ind. 189.

⁶⁹ *Harris v. Harris*, 8 Ill. App. 57; *Cartwright v. McGowan*, 121 Ill. 388; *Spears v. Burton*, 31 Miss. 547; *Rash's Estate*, 21 Mont. 170; *Erwin v. English*, 61 Conn. 502.

pitude is only incidentally involved. The law always presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy, and this presumption is one of the strongest known to the law.⁷⁰

§ 387. **Illegal inception of cohabitation.**—It would seem that if the cohabitation of parties is shown to have been illicit in its inception, the mere continuance of the relation raises no presumption of marriage.⁷¹ On the contrary, the presumption will be that the relation continued as it began.⁷² In such event it would further seem that nothing short of actual proof of marriage, or such a total change in the character of the cohabitation as will amount to such proof, will be sufficient to validate the *status* of the parties.⁷³ There is no doubt, however, but that this latter may be done, notwithstanding an apparent dissent in some of the states. In rare instances it has been held that the presumption of a continued illicit relation is one of law,⁷⁴ and this, if it means anything means that it shall have the effect of a rule that cannot be controverted. The better reasoned cases, however, maintain that it is a presumption of fact and open to rebuttal, and hence, if a change from illicit to licit or matrimonial relations occurs such fact may be established by the ordinary forms of evidence applicable to this class of cases,⁷⁵ and this too, notwithstanding the precise time or occasion thereof cannot be clearly ascertained.⁷⁶

In any event, if evidence can be adduced which shows a change in the conduct of the parties, or a change in the manner of their treatment by relations and friends, or any other facts which tend to indicate that they had changed their *status*

⁷⁰ Teter v. Teter, 101 Ind. 129; Pittinger v. Pittinger, 28 Colo. 308; Jones v. Gilbert, 135 Ill. 27.

⁷¹ Harbeck v. Harbeck, 102 N. Y. 714, 3 Cent. 430; White v. White, 82 Cal. 427, 7 L. R. A. 799; Cartwright v. McGowan, 121 Ill. 388, 12 N. E. Rep. 737.

⁷² See Floyd v. Calvert, 53 Miss. 40; Barnum v. Barnum, 42 Md. 297; Hunt's Appeal, 86 Pa. St. 294; Badger v. Badger,

88 N. Y. 546; Potter v. Clapp, 203 Ill. 592.

⁷³ Blackburn v. Crawford, 3 Wall. (U. S.) 176; Grimm's Estate, 131 Pa. St. 202; Potter v. Clapp, 203 Ill. 592.

⁷⁴ See Cargile v. Wood, 63 Mo. 511.

⁷⁵ Potter v. Clapp, 203 Ill. 592.

⁷⁶ See Badger v. Badger, 88 N. Y. 554; White v. White, 82 Cal. 427.

before the world, and intended to make that relation lawful which before was unlawful, although such evidence may not go to the direct proof of marriage, yet it may be sufficient grounds upon which to found the presumption of marriage.⁷⁷ Hence, if it appears that after the birth of the claimant, though born a bastard, there was cohabitation of his father and mother, the latter assuming the name of the former, and that the parties treated each other as man and wife, and treated the claimant as their child, and that they were treated as and reputed to be man and wife by their friends and acquaintances, these are facts proper to be submitted to the jury and from which marriage may be inferred, notwithstanding the original illicit connection of the parties.⁷⁸

§ 388. **Void marriage.**—If parties entering into what purports to be a marriage relation were, in fact, without capacity for such purpose, as if either had a lawful husband or wife living at the time, the marriage is absolutely void.⁷⁹ A void marriage is without effect for any legal purpose, and its invalidity may be shown in any court and between any parties, either in the lifetime of the parties thereto or after their death.⁸⁰ It has been held, that where it is shown that the relation began with a formal marriage, which was in fact invalid because one of the contracting parties had a lawful spouse living at the time, the continuance of the cohabitation will not afford any presumption of a second legal marriage contracted after the death of such spouse.⁸¹ Under circumstances of this kind, it is said, the law will raise no presumptions, the question to be determined being one of fact and not of law. But while this doctrine is announced in unqualified terms in some of the decisions, it would yet seem that it should be applied only in exceptional cases indicating moral turpitude on the part of those who seek to enforce rights which only accrue from legitimate relations. The better rule would seem to be, particularly in cases involving questions of legitimacy and succession, that

⁷⁷ *Potter v. Clapp*, 203 Ill. 592.

⁷⁸ *Jones v. Jones*, 45 Md. 144.

⁷⁹ *Potter v. Clapp*, 203 Ill. 592.

⁸⁰ *Cartwright v. McGowan*, 121 Ill. 388.

⁸¹ *Randett v. Rice*, 141 Mass.

391; *Collins v. Voorhees*, 47 N.

J. Eq. 555; *Rose v. Rose*, 67

Mich. 619, 35 N. W. Rep. 802.

where an attempted marriage is void by reason of the disability of one of the parties, a subsequent marriage will be presumed after the disability has been removed, where the matrimonial relationship is continued and the parties hold themselves out, and are regarded and treated by their friends and acquaintances, as husband and wife.⁸²

But while the courts are ever inclined to indulge in all reasonable presumptions to sustain the legality of the relation, yet, if the evidence clearly excludes such presumptions they must be rejected, and the mere fact of cohabitation and its attendant circumstances becomes immaterial.⁸³

§ 389. **Proof of birth.**—The facts of birth and relationship may be proved directly by the testimony of a person present at the accouchment, as the midwife, nurse, attending physician, etc., or by secondary evidence of any grade recognized by the courts, or even by general reputation. The testimony of eye-witnesses of the event is the preferable mode of making proof, yet it must frequently happen that direct proof of this character cannot be procured and from the difficulty which attends the production of such evidence the law permits secondary evidence as presumptive of the facts sought to be established.⁸⁴ The general rule is that children are presumed to be legitimate and the burden of establishing illegitimacy rests upon those asserting it.⁸⁵ This presumption applies to every case where the question of legitimacy is at issue.⁸⁶

§ 390. **Continued—General reputation.**—As an incident of pedigree the facts of birth and parentage may, to some extent, be shown by that form of hearsay known as general reputation, and evidence that a person has been generally recognized as the legitimate offspring of the alleged parents will

⁸² *Blanchard v. Lambert*, 43 Iowa, 228; *Barker v. Valentine*, 125 Mich. 336, 84 N. W. Rep. 297, 84 Am. St. 578; *Johnson v. Johnson*, 114 Ill. 611; *Yates v. Houston*, 3 Tex. 449.

⁸³ *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. 105; *Williams v. State*, 44 Ala. 44; *Harrison v. Lincoln*, 48 Me. 205; *Emerson v. Shaw*, 56 N. H. 418; *Jones v.*

Jones, 45 Md. 144; *Weinberg v. State*, 25 Wis. 370.

⁸⁴ *Hathaway v. Evans*, 113 Mass. 267; *Webb v. Richardson*, 42 Vt. 465; *Eaton v. Tallmadge*, 24 Wis. 217; *Van Sickle v. Gibson*, 40 Mich. 170.

⁸⁵ *Matthews' Estate*, 153 N. Y. 443.

⁸⁶ *Matthews' Estate*, 153 N. Y. 443.

be received to support the legal presumption of legitimacy.⁸⁷ But the same latitude is not permitted to overcome this general presumption, and evidence of mere rumors, doubts, and the like among neighbors as to the paternity of a child, is inadmissible upon the question of parentage.⁸⁸

§ 391. *Presumption of legitimacy.*—As a rule, the only proof of legitimacy which a claimant is required to produce in the first instance, is satisfactory evidence of the marriage of his parents and his own subsequent birth. When this has been done the law raises a presumption in his favor that can be overcome only by strong and convincing proof.⁸⁹ It was formerly the rule in England,⁹⁰ and it would seem also in this country,⁹¹ that when a child was shown to have been born in wedlock the presumption of legitimacy was conclusive.⁹² Indeed this was always the case, according to the old law, provided the husband was "within the four seas." But recent years have greatly modified the old rule and now, while the presumption may not be rebutted by circumstances which only create doubt and suspicion,⁹³ it may yet be wholly destroyed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so that it would have been impossible to have had intercourse or carnal communication of any kind with the mother; (3) absent at the particular period during which the child must, in the course of nature, have been begotten; or (4) present under such circumstances as afford clear and satisfactory proof that there was no intercourse.⁹⁴

The question of the legitimacy or illegitimacy of the child of a married woman is now regarded as one of fact, resting on

⁸⁷ *Illinois, etc. Co. v. Bonner*, 75 Ill. 315.

⁸⁸ *Metheny v. Bohn*, 160 Ill. 263.

⁸⁹ *Orthwein v. Thomas*, 127 Ill. 554; *Scott v. Hillenberg*, 85 Va. 245.

⁹⁰ *Cruise, Dig.*, tit. 29.

⁹¹ 1 *Greenl. Ev.*, § 28.

⁹² *Haddock v. Railway Co.*, 85 Mass. 298; *Whitman v. State*, 34 Ind. 360. And see *Illinois, etc. Co. v. Bonner*, 75 Ill. 315.

⁹³ *Metheny v. Bohn*, 160 Ill. 263.

⁹⁴ This rule, announced in the English case of *Hargrave v. Hargrave*, 9 Beav. 552, has since been substantially followed in this country. See *Shuman v. Shuman*, 83 Wis. 254; *Estate of Mills*, 137 Cal. 298; *Scanlon v. Walshe*, 81 Md. 118, 48 Am. St. 488, 31 Atl. Rep. 498; *Orthwein v. Thomas*, 127 Ill. 554; *Woodward v. Blue*, 107 N. C. 407.

proof as to the non-access of the husband, and the facts should generally be left to the jury for determination.⁹⁵ In the nature of the case, the paternity of a child can hardly be said to be subject to direct proof, and it is for this reason that the law presumes legitimacy from the mere circumstance that it is born in wedlock, and requires strong evidence to overcome the presumption.⁹⁶ Yet, where on the issue of legitimacy the evidence strongly tends to prove non-access it should be left to the jury to weigh the evidence against the presumption, and decide according to the preponderance.⁹⁷

If the husband have access, then, notwithstanding others at the same time are carrying on a criminal intimacy with the wife, a child born under such circumstances is still regarded as legitimate in the eye of the law.⁹⁸ But if the wife is living apart and separate from the husband, and particularly if she is living in open adultery, the legitimacy of a child born under such circumstances is not established by the mere fact of wedlock.

As a general proposition, however, a person claiming legal *status* will, on a proper *prima facie* showing, be deemed legitimate until the contrary is conclusively shown, and the fact that one was brought up in the family of persons living together as husband and wife, as their lawful offspring, and was treated and recognized as their child by them, imposes the burden of disproving his legitimacy and right to inheritance upon those who deny the *status* or affirm themselves to be the rightful heirs.⁹⁹

§ 392. Continued—Ante-nuptial conception.—So strong is the presumption of legitimacy arising from birth in wedlock, that it will not be overcome by mere proof of ante-nuptial conception. In numerous cases it has uniformly been held that conception during wedlock is not essential to the presumption of legitimacy which arises from birth in wedlock,¹

⁹⁵ 2 Kent, Com. 210; Schouler, Dom. Rel., § 225.

⁹⁶ Woodward v. Blue, 107 N. C. 407.

⁹⁷ Woodward v. Blue, 107 N. C. 407; Wright v. Hicks, 15 Ga. 160.

⁹⁸ By the civil codes of some of the states the issue of a wife

cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.

⁹⁹ Metheny v. Bohn, 160 Ill. 263, 43 N. E. Rep. 280.

¹ Dennison v. Page, 29 Pa. St. 420; Wright v. Hicks, 12 Ga. 155.

and this principle, in some of the cases, has been carried to great length.²

§ 393. **Continued—Character of evidence.**—Where illegitimacy is properly made an issue it is a fact, which, like other facts, must be proved by competent evidence. The dictates of decency and morality, no less than the requirements of sound public policy imperatively reject all testimony by either husband or wife to show that a child born in wedlock but begotten before is not the offspring of the parties,³ nor can the testimony of the mother be received to prove non-access of the husband during the time they lived together.⁴

In all cases clear and conclusive evidence is required to overcome the legal presumption,⁵ yet, as the fact of non-access at the time of conception is negative in its character, it follows that it cannot be established directly and without proof of other circumstances. It may be established indirectly, however, by proving the impossibility of a contrary fact. Thus, while it cannot be proved by direct evidence that the husband and wife did not cohabit, yet it may be shown that the husband was in one place and the wife in another, and that they had been living separate for some years prior to the birth.⁶

§ 394. **Proof of death.**—In order to establish the claim of the heir it is necessary in all cases to prove the death of the ancestor, the presumption being, in the absence of proof to the contrary, that an individual once shown to be alive is still living.⁷ Great lapse of time, will, of course, rebut this presumption and in the interval of say one hundred years, a party

² In *Zachman v. Zachman*, 201 Ill. 380, it was held that a child born in wedlock is presumed to be legitimate, though the husband and wife have been married but fifteen days and the wife had been divorced from a former husband but twenty days, there being no evidence that he had lived with her at or within the period of conception.

³ *Dennison v. Page*, 29 Pa. St. 420; *Parker v. Way*, 15 N. H. 45.

⁴ *Abington v. Duxbury*, 105 Mass. 290; *Mink v. State*, 60 Wis.

583; *Scanlon v. Walshe*, 81 Md. 118; *Boykin v. Boykin*, 70 N. C. 262; *Tloga v. South Creek Township*, 75 Pa. St. 436.

⁵ *Watts Owens*, 62 Wis. 512; *Wright v. Hicks*, 12 Ga. 155; *Egbert v. Greenwalt*, 44 Mich. 245.

⁶ *Dean v. State*, 29 Ind. 483.

⁷ *Martinez v. Vives Succession*, 32 La. Ann. 305; *Whiting v. Nicoll*, 46 Ill. 230; *Moshelmer v. Ussleman*, 36 Ill. 232; *Peabody v. Hewett*, 52 Me. 33.

must be presumed to have died in the ordinary course of nature.⁸ The civil law, however, presumes a person living at one hundred years of age, and the common law does not stop much short of this.⁹

It is a further generally accepted rule that death must be proved the same as any other fact, although formerly many presumptions seem to have been admitted. Whenever possible direct and positive evidence should be produced, and the most satisfactory proof of the death of an individual is the testimony of those who saw him die, or who, having known him when living, saw and recognized his body after his decease. With respect to testimony of this character but little question can arise. For this purpose it is customary to call the attending physician who was employed during the last sickness, the clergyman who officiated at the funeral, or the undertaker who prepared the remains for interment. Relatives and friends of the deceased who knew him in life and afterwards viewed the corpse are all competent to testify to the fact of death.

But death, like any other fact, may be proved by circumstantial evidence. Thus, a sudden disappearance, particularly if coupled with an unsound mental or physical condition,¹⁰ or proof of the wreck of a vessel in which the ancestor was known to have taken passage,¹¹ or any other circumstances¹² from which the death of a person may reasonably be inferred,¹³ are all competent to show the fact in connection with long and

⁸ *Montgomery v. Bevans*, 1 the doctrine of the English Saw. (C. Ct.) 653; *Sprigg v. Moale*, 28 Md. 497.

⁹ *Watson v. Tindall*, 24 Ga. 494.

¹⁰ *John Hancock, etc. Co. v. Moore*, 34 Mich. 41; *Chapman v. Kimball*, 83 Me. 389; *Cox v. Ellsworth*, 18 Neb. 664.

¹¹ *Holmes v. Johnson*, 42 Pa. St. 159; *Offenheimer v. Wolf*, 3 Sandf. Ch. (N. Y.) 571; *White v. Mann*, 26 Me. 361; *Davis v. Briggs*, 97 U. S. 628; *Learned v. Corley*, 43 Miss. 687. This is also

the doctrine of the English cases.

¹² As where a man in feeble health and weak constitution has been absent for twenty years without any news of him, his former habit of writing to his friends having ceased without any explanation. *Chapman v. Kimball*, 83 Me. 389.

¹³ *Johnson v. Merithew*, 80 Me 111; *Lancaster v. Washington, etc. Co.*, 62 Mo. 121; *Manley v. Pattison*, 73 Miss. 417; *Jamison v. Smith*, 35 La. Ann. 606.

unexplained absence.¹⁴ In such cases, however, the evidence should be of a convincing character and of such a nature as to exclude reasonable doubts.¹⁵ The burden of proving death at any particular period is with the person to whose title that fact is essential.¹⁶

§ 395. Continued — Reputation — Hearsay.—It is frequently asserted that death may be proved by reputation, and by hearsay, as well as by facts inconsistent with the continuance of life.¹⁷ Upon this point, however, there is much conflict of authority. It is generally held that declarations of deceased members of a family, made *ante litem motam*, are admissible to prove pedigree, such declarations being received as a sort of original evidence on grounds that have long been considered sound. It is further held, in this country at least, that the term pedigree embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events occurred.¹⁸ In England, and possibly some of the states, the rule is limited strictly to cases involving pedigree, and does not apply to proof of the facts which go to make up pedigree, such as birth, marriage and death, when they have to be proved for other purposes.

The strict application of this rule of admission confines it to the declarations of deceased persons, who were related by blood or affinity to the person proposed, and therefore interested in the succession in question, and excludes mere repute in the family created wholly by the living. This, it is said, amounts to nothing more than opinion or belief, and however strong or well grounded this belief may be it cannot be accepted as a proof of the fact. It is claimed, in support of this contention, that the proof of a death is no more difficult than many other facts which are required to be shown to determine the rights of litigants. Any facts or circumstances relating

¹⁴ *Boyd v. Insurance Co.*, 34 La. Ann. 848; *Wentworth v. Wentworth*, 71 Me. 72; *Leach v. Hall*, 95 Iowa, 611; *Bank v. Public Schools*, 83 Ky. 219.

¹⁵ *Cox v. Ellsworth*, 18 Neb. 664; *Davis v. Briggs*, 97 U. S. 628.

¹⁶ *Evans v. Stewart*, 81 Va. 724.

¹⁷ *Lawson*, *Presumptive Evl.* 197.

¹⁸ 1 *Greenl. Ev.* § 104; *Stah v. Bowman*, 38 U. S. 220, 10 L. Ed. 134.

to the character, habits, condition, affections, attachments, prosperity, and objects of life, which usually control the conduct of men and are motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence.¹⁹ When all of these facts are within the knowledge of living witnesses, and none of such facts are derived from the declarations of deceased members of the family, then, it is contended, there is no necessity for resorting to family reputation. The testimony of such witnesses should be produced in court and from it the triers should find such as it might tend to prove. As a corollary to this line of reasoning it follows, that however much and long the members of a family may have reflected upon and brooded over such known facts, circumstances, and incidents of the case, considered in reference to the character and habits of the person whose death is in question, the result of such cogitation is only their opinion or belief based upon such facts, circumstances and incidents.²⁰

As before remarked, the authorities on the question now under consideration are conflicting. While the reasoning which sustains the foregoing is logical and in consonance with legal theories, it is yet rejected in a number of cases, and, in the absence of better evidence, it has frequently been held that resort may be had to what is commonly said and understood to be true among the immediate relatives and family connections of the person to whom the inquiry relates.²¹ In some cases the principle has been extended to cover a reputation of death among friends and acquaintances, and evidence of such reputation has been admitted where the person reputed to be dead left no relatives or kindred.²² In support of this wide depart-

¹⁹ *Tisdale v. Insurance Co.*, 26 Iowa, 170; *Reedy v. Milhizen*, 155 Ill. 636.

²⁰ *Estate of Hurlburt*, 68 Vt. 366, 35 L. R. A. 794. And see *Blaisdell v. Bickum*, 139 Mass. 250; *Ross v. Loomis*, 64 Iowa, 432; *De Haven v. De Haven*, 77 Ind. 239; *Wilson v. Brownlee*, 24 Ark. 586; *Chapman v. Chapman*, 2 Conn. 347.

²¹ *Clark v. Owens*, 18 N. Y. 434; *Norris v. Edwards*, 90 N. C. 382; *Jackson v. Boneham*, 15 Johns. (N. Y.) 226; *Bailey v. Bailey*, 36 Mich. 181.

²² *Ringhouse v. Keever*, 49 Ill. 470. And see *Insurance Co. v. Moore*, 34 Mich. 41; *Woolsey v. Williams*, 128 Cal. 558.

ure from ancient usage it is said, that, in a population as unstable as ours, the refusal of all evidence of reputation in regard to death, unless it comes from family relatives, will sometimes render proof of a death impossible, though there might be no doubt of the fact, and thus the ends of justice would be defeated.

§ 396. **Presumption of death—Grant of letters of administration.**—Death may also be shown by any secondary evidence which is sufficient to raise a legal presumption. Thus, the grant of letters of administration is *prima facie* evidence of the death of the person upon whose estate they are issued, and courts may presume the death of the intestate upon their production,²³ yet the presumption thus raised is of the lowest class; is weak and inconclusive, and may be rebutted by slight evidence to the contrary.²⁴ But while this is undoubtedly the general rule the reason therefor is not very apparent. In all cases, upon the grant of letters testamentary there is an inquest and judicial finding. Competent and satisfactory proof is supposed to have been offered on the hearing of the petition and the fact of death duly established before letters are granted. A judicial finding of death should, therefore, raise more than a weak and inconclusive presumption. In subsequent litigation, particularly with respect to proprietary rights growing out of inheritance, evidence of this character should be accorded full weight and should not be disturbed except by counter evidence of a strong and convincing nature.

§ 397. **Continued—Unexplained absence.**—While the common law raised a presumption of the continued existence of a person shown to have been once living, in the absence of proof to the contrary, yet this presumption does not seem to have been supported by any definite rule. It was always assailable by evidence that the person had absented himself from his usual place of residence and had not been heard from by those to whom his continued existence would naturally have been known, and when the absence amounted to a period of

²³ French v. Frazier, 30 Ky. 425; Holmes v. Johnson, 42 Pa. St. 159; Pick v. Strong, 26 Minn. 303; Brown v. Elwell, 17 Wash. 442.

²⁴ Tisdale v. Insurance Co., 26 Iowa, 170. And see English's Adm'r v. Murray, 13 Tex. 366.

seven years the presumption of life ceased and a presumption of death arose, which, in the absence of counter-proof was allowed to prevail.²⁵ This doctrine has been reaffirmed by the American courts, and it has repeatedly been held that an absence of seven years, without tidings, will create a presumption of death,²⁶ leaving it incumbent on the party who claims a benefit or interest in the ancestor being alive, within that time, to prove it.²⁷ The doctrine has further found expression in the statutory policy of many states, and it is held that the presumption of death raised by such enactments is not a presumption of fact, but of law, which, in the absence of rebutting evidence, stands as proof of death.²⁸ To raise the presumption, however, there must be evidence of diligent inquiry at the person's last place of abode and among those who would probably have heard from him if living, but when this is shown and that no intelligence concerning him has been received, the presumption will be effective until the contrary has been proved.²⁹ On the other hand, evidence of a search made for a missing person at a place other than his known place of residence is insufficient to raise a presumption of death,³⁰ and continuance of life will be presumed until by proper proof the contrary presumption has been raised.³¹ In any event mere lapse of time is not alone sufficient to create such presumption.³²

²⁵ *Meyer v. Madreperla*, 68 N. J. L. 258, 53 Atl. Rep. 477, 96 Am. St. 536. And see 2 Greenl. Ev., § 278, 1 Taylor, Ev. § 220.

²⁶ *Whiting v. Nicoll*, 46 Ill. 230; *Davie v. Briggs*, 97 U. S. 628; *Adams v. Jones*, 39 Ga. 479; *Wentworth v. Wentworth*, 71 Me. 72; *Johnson v. Merithew*, 80 Me. 111; *Flynn v. Coffee*, 94 Mass. 133.

²⁷ *Hoyt v. Newbold*, 45 N. J. L. 219. Presumption of death arises where a person leaves his home and place of business for a temporary purpose and is not heard from in seven years. *Stockbridge v. Stockbridge*, 145 Mass. 517.

²⁸ *Meyer v. Madreperla*, 68 N. J. L. 258.

²⁹ *Hitz v. Ahlgren*, 170 Ill. 60; *Wentworth v. Wentworth*, 71 Me. 72; *Bailey v. Bailey*, 36 Mich. 182; *Posey v. Hanson*, 10 App. D. C. 496.

³⁰ *Morrison's Estate*, 183 Pa. 155.

³¹ *Schaub v. Griffin*, 84 Md. 557. Thus, no presumption of the death of a person who has changed his domicile arises from the fact that he has not been heard from at his former domicile for seven years; the presumption in such case being, if alive at his new domicile when last heard from, that life continues. *Francis v. Francis*, 180 Pa. 644, 37 Atl. Rep. 120.

³² *Schaub v. Griffin*, 84 Md. 557.

There is no presumption, however, that a person proved or presumed to be dead left no children or descendants,³³ even though it may be shown that when last heard from he was unmarried.³⁴ This is a substantive fact, to be proved the same as any other fact of pedigree.

§ 398. **Presumption of time of death.**—It is, of course, of no importance, to one claiming a right which becomes established at death, at what precise time the ancestor may have died, yet, as it may be important to one resisting that right, it becomes an affirmative fact which the party alleging should prove. But this, in many cases, and indeed in all cases where time and absence are alone relied on, would be impossible, and so, to render the presumption more effective, a further presumption is raised that death occurred at the expiration of the seven years.³⁵ This, however, is but an arbitrary presumption rendered necessary on grounds of public policy, in order that rights depending upon the life or death of persons long absent and unheard of may be settled by some certain rule.³⁶ It is repelled by very slight facts and circumstances,³⁷ and courts have refused to entertain the presumption after an interval of twenty years, where the circumstances rendered it improbable that parties, if alive, would have communicated with their friends.³⁸ For all practical purposes, however, it has come to be regarded as a settled doctrine that the absence of a party for seven years, without any intelligence being received of him in that time, raises a presumption that he is dead, and the jury, on proof of such absence, have a right to presume his death. A less period will not suffice to raise this

³³ *Posey v. Hanson*, 10 D. C. App. 496.

³⁴ *Still v. Hutto*, 48 S. C. 415.

³⁵ *Stevens v. McNamara*, 36 Me. 176; *Smith v. Knowlton*, 11 N. H. 191; *Cowan v. Lindsay*, 30 Wis. 586; *Flynn v. Coffee*, 12 Allen (Mass.), 133; *Puckett v. State*, 1 Sneed (Tenn.), 355; *Meyers v. Madreperla*, 68 N. J. L. 258; *Spencer v. Roper*, 35 N. C. 333; *Schaub v. Griffin*, 84 Md.

557; *Reedy v. Millizen*, 155 Ill. 634.

³⁶ *Whiting v. Nicoll*, 46 Ill. 230.

³⁷ *Smith v. Smith*, 49 Ala. 158; *Brown v. Jewett*, 18 N. H. 230; *Wentworth v. Wentworth*, 71 Me. 72; *Dowd v. Watson*, 105 N. C. 476.

³⁸ *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Watson v. Tindall*, 24 Ga. 274; *Sprigg v. Moale*, 28 Md. 497.

presumption, and a party whose interest it is to show that the party was living within that term is at liberty so to do by such facts and circumstances as will inspire that belief in the minds of the jury. But the claimant has done all that is required when he has raised the presumption; to overthrow this is a duty devolving upon the defendant.³⁹

A presumption of death within seven years of the time of a person's disappearance may be raised upon the presentation of facts calculated to incite that belief.⁴⁰ It has been held, in such event, that it must be shown that he was exposed to some specific peril,⁴¹ but, as a general rule, all the conditions by which the presumption of life for seven years may be affected, such as health, age, habits, disposition, pecuniary circumstances, family relations, etc., may properly be considered in determining whether the life of the absent party continued the entire seven years or terminated sooner.⁴²

§ 399. Continued—Death of children.—The general presumption of death which arises from long and unexplained absence does not, as a rule, apply to children of tender years, particularly where such children are members of a family, or when last heard of were under parental control. Nor will the statute which provides for such presumption in the case of one who shall absent himself from the state for seven years without being heard of, be sufficient without the aid of other proof.⁴³ Such statutes, it is said, refer only to persons having volition and the right of free movement, and not to children who, by reason of their age, are incapable of absenting themselves from the state. The mere fact that residents of a locality have heard nothing of a man and his family, who more than seven

³⁹ Hoyt v. Newbold, 45 N. J. L. 219.

⁴⁰ Waite v. Coarcy, 45 Minn. 159; Winter v. Supreme Lodge, 96 Mo. App. 1.

⁴¹ Re Mutual Ben. Co., 174 Pa. St. 1; Learned v. Corley, 43 Miss. 637.

⁴² Reedy v. Millizen, 155 Ill. 636; Leach v. Hall, 95 Iowa, 611. In the latter case it was held that the absence for six years

and some months, without being heard from, of a person who when last seen was very sick with consumption, raises a presumption of his death, where he was warmly attached to his mother and sister, and was in the habit of writing to them frequently.

⁴³ Manley v. Pattison, 73 Miss. 417, 55 Am. St. 543.

years before, removed from the locality, is entirely consistent with the continued life and health of every member of the family, and the probability of death of any one of said family is not suggested by proof that the family has not been heard from since its removal.

§ 400. **Survivorship.**—The general rule now is that, where the question of succession turns upon the fact of survivorship, direct evidence must be furnished. The civil law deduced a presumption concerning survivorship between persons exposed to the same cause of death, from circumstances of age, sex, or physical strength. According to this law the presumptions were never in favor of contemporaneous death, neither was there room for dispute. Where a father and son perished in the same battle or shipwreck, the son, if above the age of puberty, was presumed to have survived his father; if under that age to have predeceased him. This was based upon the idea that in the former case the son was stronger, and in the latter weaker, than his father. So, if persons perishing in the same disaster were all under the age of fifteen, the presumption of survivorship was with the elder; if all were over sixty, with the younger. Similarly, the wife, being of the weaker sex, was presumed to have first yielded to the common peril.⁴⁴ But these presumptions never seem to have prevailed in the common law, or, if ever recognized, have long been denied, and the rule is that where several lives are lost in the same disaster there is no presumption that either survived the other. Neither is it presumed that all died at the same moment, but the fact of survivorship, like any other fact, must be proved by the party asserting it.⁴⁵ In the absence of evidence from which the contrary may be inferred, all may be

⁴⁴ The codes of Louisiana and California maintain this view. And see *Smith v. Croom*, 7 Fla. 81.

⁴⁵ *Coye v. Lach*, 8 Met. (Mass.) 371; *Newell v. Nichols*, 75 N. Y. 78; *Smith v. Croom*, 7 Fla. 81; *John Hancock, etc. Co. v. Moore*, 34 Mich. 41; *Middeke v. Balder*, 198 Ill. 590; *Russell v. Hallett*, 23 Kan. 276; *Casualty Co. v.*

Kacer, 169 Mo. 301. In the case of a mother, aged sixty-nine years, her son-in-law, aged forty-five years, and his two children, aged respectively ten and seven years, who all perish in the same shipwreck, there is no presumption of survivorship. *Newall v. Nichols*, 75 N. Y. 78. And see 2 Best, Ev. 187; 1 Taylor, Ev. 201; 1 Greenl. Ev. 28.

considered to have perished at the same time, not because the fact is presumed, however, but because, from a failure of those asserting it to produce evidence to the contrary, property rights must necessarily be settled on that theory.⁴⁶ If there are other circumstances shown, tending to prove survivorship, courts will then look at the whole case for the purpose of determining the question,⁴⁷ but, if only the simple fact of death by a common disaster appears, its inherent uncertainty is in itself sufficient to preclude further action and the law will not raise a presumption by balancing probabilities, either that there was a survivor or who it was. In such event the question of survivorship must be regarded as unascertainable and rights of succession must be determined as if death occurred to all at the same moment.⁴⁸ When all are thus treated as having died at the same instant it necessarily follows that no one of them took from any of the others by reason of the other's death.⁴⁹

In practice, the application of the rule is undoubtedly equivalent to a presumption of simultaneous death,⁵⁰ but the courts, while announcing this result, are generally united in declaring that it is not a case of presumption but of inability to prove the necessary fact, and that in this, as in all other contested questions, in the absence of evidence the party who has the burden of proof must fail.⁵¹

§ 401. **Civil death.**—At common law, and under the old English systems of property, there was a condition known as *civil death*. The term has to some extent survived and found a place in the jurisprudence of this country, but the ideas which it formerly served to connote have disappeared. Notwithstanding that it may be found in the statutes of some states

⁴⁶ Johnson v. Merithew, 80 Me. 111; Russell v. Hallett, 23 Kan. 276; Ehle's Estate, 73 Wis. 445; Middeka v. Balder, 198 Ill. 590; Petition of Willbor, 20 R. I. 126.

⁴⁷ Ehle's Estate, 73 Wis. 445. And see Smith v. Croom, 7 Fla. 81.

⁴⁸ Petition of Willbor, 20 R. I. 126; Coye v. Leach, 8 Met. (Mass.) 371; Newell v. Nichols, 75 N. Y. 78. The English cases announce the same doctrine.

⁴⁹ Middeka v. Balder, 198 Ill. 590, 92 Am. St. 284, 64 N. E. Rep. 1002; Fuller v. Linzel 135 Mass. 468.

⁵⁰ Russell v. Hallett, 23 Kan. 276.

⁵¹ Middeka v. Balder, 198 Ill. 590.

and is employed colloquially in all of the states, yet, as a matter of fact, there is but one kind of death known to our laws and that is the actual ceasing of life, or natural death.⁵²

From time to time attempts have been made to assert rights of inheritance in the lands of living persons convicted of infamous crimes and sentenced to imprisonment for life, upon the ground that such persons were civilly dead. But the courts, even in states where life convicts are by statute deemed civilly dead, have uniformly held that the mere fact of conviction reaches nothing more than political *status*, and that a convict is neither dead in fact nor in law.⁵³ Such being the case it follows that no one may recover property as his heir at law while he remains alive.

§ 402. **Posthumous children.**—An heir may claim by descent even though born after the death of his immediate ancestor. Indeed, for the purposes of inheritance, a child, in contemplation of law, is in existence from the moment of its conception.⁵⁴ This was always the rule of the common law, while the statute, in many states, has confirmed and extended the common-law rule by an express provision that a posthumous child, born alive, shall be considered as living at the decease of the parent. In fact, this may now be taken as the general doctrine in the United States, for where an express enactment is wanting the rule is necessarily implied in other statutory provisions. The rule, however, is usually confined in its operation to children of the deceased, and posthumous relatives, other than children, will be denied rights of inheritance.⁵⁵

The rule is generally construed strictly in favor of the posthumous child. Its share in the inheritance vests at the moment of the ancestor's death, and cannot be divested by any proceeding to which it is not a party,⁵⁶ and if lands in which the child has an interest are sold, or otherwise disposed of in

⁵² *Frazier v. Fulcher*, 17 Ohio St. 260; *Willingham v. King*, 23 Fla. 478; *Avery v. Everett*, 110 N. Y. 317.

⁵³ *Davis v. Laning*, 85 Tex. 39.

⁵⁴ See *Botsford v. O'Conner*, 57

Ill. 72; *Bishop v. Hampton*, 11 Ala. 254; *Mutual Ben. Ass'n v. Firname*, 50 Mich. 82.

⁵⁵ *Shriver v. State*, 65 Md. 278.

⁵⁶ *Botsford v. O'Conner*, 57 Ill. 72.

ignorance of the conception of such child, it seems that they may be reclaimed from the possession of the purchaser notwithstanding he may have bought in good faith and for a valuable consideration.⁵⁷

The test of legitimacy, however, applies to posthumous children with the same force as to other children, and, in addition to the facts which decide the question in ordinary cases it is necessary that the posthumous child shall be shown to have been born within the natural period of gestation, reckoning from the death of the ancestor. The old rule was, that the birth must occur within nine months, or forty weeks, after the death of the husband,⁵⁸ but the strictness of the rule has been much relaxed in modern times with the increase of physiological knowledge and the better information we now possess concerning embryology. While this period is still considered as the usual time courts will, nevertheless, exercise a discretion in allowing a longer time where the circumstances of the case or the opinions of physicians seem to require it. In some states the right to inherit is made dependent on the birth of the heir within a specific period after the death of the ancestor, following in this respect the rule of the common law, but this limitation is intended only for the avoidance of fraud and the introduction of spurious heirs, and not as a denial of the interest of posthumous children in the estate of their ancestor.

§ 403. **Illegitimates—The rule stated.**—By the stern rule of the common law an illegitimate child is not the kindred of any one; he can neither acquire nor transmit rights of inheritance, except with respect to his own lineal descendants lawfully begotten, and if he dies intestate and without issue his property escheats to the state. To avoid the unfortunate consequences flowing from such a condition the law now presumes that every child is the offspring of a lawful, rather than a meretricious, union of the parents, and, in the absence of negative evidence, no supplemental proof is necessary. If the presumption be false, repellant facts may generally be shown, but

⁵⁷ *Detrick v. Migatt*, 19 Ill. 314; *Peason v. Carlton*, 18 S. C. 146; *Botsford v. O'Conner*, 57 47.
Ill. 72; *Massie v. Hiatt*, 82 Ky.

⁵⁸ *Cruise*, Dig., tit. XXIX, ch. 2.

the repelling evidence must, in all cases, be strong, satisfactory and conclusive.⁵⁹ General reputation as to illegitimacy is not admissible,⁶⁰ nor will suspicions, conjectures or rumors, however strong, serve to rebut the presumption,⁶¹ for the charity of the law is in favor of the child and those who seek to bastardize him must make out the fact by clear and irrefragible proof.⁶²

Where the necessary facts are shown and every reasonable possibility of a marriage has been disproved, or where though a marriage is shown, the fact of illegitimacy is yet made to unmistakably appear, thus clearly demonstrating that the claimant has no inheritable capacity by reason of the circumstances of birth, the rule first stated will apply unless changed or modified by legislative enactment.⁶³

In the United States the rule of the common law nowhere obtains in all its original severity. A more humane and enlightened course has been generally adopted and while the principles which control the common-law doctrine have not been infringed the practical applications of the principles have been greatly modified. As a general rule an illegitimate will inherit from its mother, equally with her other children by a lawful marriage,⁶⁴ and when the claimant asserts a right derived from or through a maternal ancestor the question of legitimacy is usually immaterial, and the same rule applies to the mother in default of lawful issue of the bastard. In some of the states rights of inheritance have been further extended, and it has been held that when an illegitimate child is regarded as the lawful heir of his mother so is he also of the legitimate

⁵⁹ *Strode v. MaGowan*, 2 Bush (Ky.), 621; *Orthwein v. Thomas*, 127 Ill. 554; *Dennison v. Page*, 29 Pa. St. 420; *State v. McDowell*, 101 N. C. 754; *Scanlon v. Walshe*, 81 Md. 118.

⁶⁰ *Phillips v. Allen*, 2 Allen (Mass.) 453; *Orthwein v. Thomas*, 127 Ill. 554.

⁶¹ *Caujolle v. Ferrie*, 23 N. Y. 91; *Patterson v. Gaines*, 6 How. (U. S.) 551.

⁶² *Orthwein v. Thomas*, 127 Ill.

554; *State v. McDowell*, 101 N. C. 734; *Scanlon v. Walshe*, 81 Md. 118.

⁶³ *Woodward v. Blue*, 107 N. C. 407; *Borroughs v. Adams*, 78 Ind. 161.

⁶⁴ *Kray v. Davis*, 87 Ind. 509; *Alexander v. Alexander*, 31 Ala. 241; *McGuire v. Brown*, 41 Iowa, 650; *Jenkins v. Drane*, 121 Ill. 217; *Goodwin v. Colby*, 64 N. H. 401; *Heath v. White*, 5 Conn. 228.

children of the mother.⁶⁵ No general rules, other than those indicated, can be formulated with respect to bastards and in questions touching a succession the local statute must be consulted.

§ 404. Continued—Variances and statutory exceptions.

As hereditary succession is purely statutory and as every state possesses the inherent right to regulate the descent of lands within its territorial boundaries, it follows that a state may provide that property situated therein may descend to others than the legitimate children of an ancestor, and that illegitimates may be given the *status* of legal heirs. This is just what has been done in some states, where statutes have been enacted giving to an illegitimate child a right of inheritance from its putative father whenever the paternity is proved during the life of such father, or where it has been recognized by him as his child.⁶⁶ The recognition required in such a case must be "general and notorious" or it must be evidenced by a writing.⁶⁷ In the latter event it would seem that the writing need not be of a formal character but that any writings, even those constituting a correspondence, will be sufficient for the purpose;⁶⁸ nor is it necessary that the writing should have been made expressly for the purpose of admitting the child to heirship.⁶⁹ The statute which permits inheritance by illegitimates has further restricted the right in some states by confining it to cases where the putative father dies without heirs resident in the United States, but in such case it must be shown that the father acknowledged the child as his own during his lifetime, and that there are no heirs resident in the United States.⁷⁰ It will be seen, therefore, that the question of inheritance by illegitimates is becoming complicated in this coun-

⁶⁵ *Messer v. Jones*, 88 Me. 349, 34 Atl. Rep. 177.

⁶⁶ *Scanlon v. Walshe*, 81 Md. 118; *Messer v. Jones*, 88 Me. 349, 34 Atl. Rep. 177.

⁶⁷ *Milburn v. Milburn*, 60 Iowa, 411. And see *Borroughs v. Adams*, 78 Ind. 160; *Rohrer v. Muller*, 22 Wash. 151, 50 L. R. A. 350.

⁶⁸ *Crane v. Crane*, 31 Iowa, 296.

⁶⁹ *Rohrer v. Muller*, 22 Wash. 151, 50 L. R. A. 350. And see *Re Gorkow*, 20 Wash. 563, 56 Pac. Rep. 385; *Blythe v. Ayres*, 96 Cal. 532, 19 L. R. A. 40.

⁷⁰ *Cox v. Rash*, 82 Ind. 519.

try and the tendency is toward a further complexity rather than a simplification.

Another phase of the question under consideration is presented where the claimant seeks to establish rights of inheritance through the mother only, and upon this question there is a practical unanimity of opinion. Even, at common law a bastard might inherit from his mother, and this right has been generally declared and confirmed by statute in all of the states, while in some states where an illegitimate is declared a lawful heir of the mother he may assert a right of inheritance from others through the mother.⁷¹ In other words, he may inherit from any person from whom the mother would have inherited if living, and his lawful issue, in case of his death, will represent him and have the same right.⁷²

§ 405. *Legitimation*.—There remains but one other point to be considered in this connection and that is, legitimation and its effect. As a general proposition, even though it may be shown that the claimant was not born in lawful wedlock the effect of such proof may be avoided by showing a subsequent marriage of the parents.⁷³ This is a direct reversal of the doctrine of the common law,⁷⁴ but, subject to the exception hereinafter noted, the general statutory rule now is, that a child born out of wedlock will be legitimized by the subsequent marriage of the parents and enabled to assert all the rights of inheritance. In such event it would seem that the subsequent marriage is a substantive fact to be proved by the claimant and the burden will devolve upon him to bring himself within the protection of the law.

In most of the states the statutory rule is stated with no exceptions. In others it is qualified by the *proviso* that it applies only to such offspring as are not the result of an incest-

⁷¹ *Messer v. Jones*, 88 Me. 349, 34 Atl. Rep. 177; *Bales v. Elder*, 118 Ill. 436.

⁷² *Jenkins v. Drane*, 121 Ill. 217.

⁷³ *Bailey v. Boyd*, 59 Ind. 292; *Miller v. Miller*, 91 N. Y. 315; *Ross v. Ross*, 129 Mass. 252; *Caballero's Succession*, 24 La.

Ann. 573; *Sunderland's Estate*, 60 Iowa, 732; *Stewart v. Stewart*, 31 N. J. Eq. 407; *Houston v. Davidson*, 45 Ga. 574; *Smith v. Kelly*, 23 Miss. 170.

⁷⁴ The common-law rule was further confirmed by the so-called "Statute of Merton," 20 Hen. III, chap. 9.

uous or adulterous intercourse. The theory of the latter seems to rest on the old civil law assumption, that at the date of the cohabitation which produced the bastard valid promises to marry had been exchanged between persons who, at that time, were capable of performing such promises, and that the subsequent marriage was in fulfillment of such promises and related back to the date of cohabitation. Hence, only the offspring of such persons as might legally marry at the time such offspring was begotten became legitimated by the subsequent marriage of the parents. In the states where this doctrine obtains the child of an adulterous union acquires no rights of legitimacy by reason of a subsequent marriage of his parents and the common-law disabilities of a bastard would seem to attach to him.⁷⁵

But the foregoing does not represent the prevailing sentiment of this country. At a comparatively early day we find statutes in the older states which not only abrogate the common law preventing all legitimation of bastards but omit all reference to the civil-law exception of adulterine bastards, and the construction placed upon these statutes has uniformly been to make no distinctions. The newer states have either reenacted these statutes or adopted their essential features and notwithstanding the parents may have been incapable of contracting a valid marriage at the time a child is begotten or born, yet, if such incapacity is subsequently removed, and after such removal the parents intermarry, and the former issue is recognized, such issue is thereby legitimated and cannot be distinguished from the other children of the parents born after marriage.⁷⁶

Another form of legitimation is recognized in a number of states. It is based on the principles of adoption and occurs where a parent adopts his own illegitimate child, not by a proceeding in a court of justice, the effect of which would be to perpetuate the record of the child's disgrace, but by publicly acknowledging it as his own and receiving it into his family,

⁷⁵ See *Sams v. Sams*, 85 Ky. 532; *Hawbecker v. Hawbecker*, 43 Md. 516; *Ives v. McNicoll*, 59 396.

⁷⁶ *Carroll v. Carroll*, 20 Tex. 731; *Blythe v. Ayres*, 96, Cal. 772; *Brock v. State*, 85 Ind. 399.

The effect of such acts, where this law prevails, is to give to such child the rights of legitimacy from the time of its birth, including the right of inheritance from the parent, and the *status* thus created is that of a child adopted by regular procedure of court.⁷⁷ It has been held, however, that these statutes apply only to parents and children domiciled within the state at the time when the acts of adoption in fact occur.⁷⁸

§ 406. **Extra-territorial effect of legitimation.**—With respect to the extra-territorial effect of legitimation the courts do not seem to be altogether agreed, and it has been suggested that the matter occupies comparatively the same position as adoption or other rights created by statute in derogation of the common law, and that, if opposed to local laws or policy it will be unavailing. The better opinion, however, and that sustained by the volume of authority, is that when an illegitimate child has, by the subsequent marriage of the parents, becomes legitimate by virtue of the laws of the state or country where such marriage was celebrated and the parents were domiciled, it is thereafter legitimate everywhere, and entitled to all the rights flowing from that *status*, including the right to inherit.⁷⁹

The general rule is, that questions of legitimacy are to be decided by the law of the domicile of origin, and, generally, when an illegitimate child has subsequently become legitimate by the laws of the country where the parents were married and dom-

⁷⁷ *Eddie v. Eddie*, 8 N. Dak. 376, 73 Am. St. 765.

⁷⁸ *Eddie v. Eddie*, 8 N. Dak. 376; *Blythe v. Ayres*, 96 Cal. 532.

⁷⁹ Plaintiff was born illegitimately at Wurtemberg, where his parents then resided, in 1845. They removed with plaintiff to Pennsylvania, where his father became a naturalized citizen. In 1853, while domiciled in the latter state, the parents married. In 1857 a law was passed legitimizing children born out of wedlock, of parents who should thereafter marry, which, by a

subsequent act, was made to apply to all cases arising prior to 1857. In 1862 plaintiff removed with his father to New York, and in 1875 his father died intestate and seized of real estate. In an action of ejectment, *held*, that plaintiff was entitled to inherit equally with the children of deceased born in wedlock. *Miller v. Miller*, 91 N. Y. 315. And see *Ross v. Ross*, 129 Mass. 243; *Scott v. Key*, 11 La. Ann. 232; *Dayton v. Adkisson*, 45 N. J. Eq. 603, 14 Am. St. 763.

iciled, he will be regarded as legitimate everywhere.⁸⁰ On the other hand, notwithstanding the subsequent marriage, if such act did not confer legitimacy in the states where the parents were then domiciled it would have been ineffective to give legitimate *status* in other states.⁸¹

§ 407. **Adoptive heirs.**—It is a cardinal rule of the law of inheritance that no person shall succeed to an ancestral estate who does not partake of the blood of the ancestor. Indeed it may be said that this is the vital principle of hereditary succession and upon its maintenance depends the entire doctrine of descent. But, within comparatively recent years, an important innovation has been made in this old rule, creating between two persons of different blood a relation, purely civil, of paternity and filiation. This artificial relation, technically known as *adoption*, is raised by a judicial act, in conformity with and in pursuance of a positive statute, and has the legal effect of conferring on the person adopted the rights of inheritance and succession, together with a number of other legal consequences and incidents of the natural relation of parent and child, the same as if such adoptive child had been born in lawful wedlock of such adoptive parents.

As adoption is purely a statutory matter all of the authorities unite in declaring that to give validity to proceedings therefor they must have been conducted in substantial conformity with statutory provisions. In a few instances, while the courts affirm this general rule, yet in view of the fact that the right is a beneficial one, both to the public and to those immediately concerned in its exercise, it has been held that the statute should receive a liberal construction with a view to uphold the validity of proceedings under it,⁸² but, as the statute

⁸⁰ *Miller v. Miller*, 91 N. Y. 315.

⁸¹ Thus, an antenuptial child was born in South Carolina, where the parents subsequently intermarried. At the time such marriage did not work legitimation. Afterwards the parents and child removed to Mississippi, where a subsequent marriage was sufficient to legitimate

antenuptial offspring, and where the father died intestate. *Held*, that the *status* of the child was fixed by the domicile of its origin, where it was illegitimate; that this *status* continued, and that it could not inherit. *Smith v. Kelly*, 23 Miss. 167.

⁸² *Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. 17. And see

creating this relation is in derogation of the common law, and, as some contend, of natural right as well, the great weight of authority sustains the rule that such statute is always to be strictly construed as against the adoptive child and that his rights can be asserted only within its letter.⁸³ Indeed this may be taken as the general rule for all times and places, but it acquires additional force when title is claimed in states other than that under whose laws the heirship was effected. The rights of inheritance acquired by an adoptive heir in one state can only be recognized and upheld in another state so far as they are not inconsistent with the laws of descent of such latter state, and his inheritable capacity must be measured by the laws of the state wherein the land is situate, and not by that of his late ancestor's domicile, or of the state conferring rights of inheritance.⁸⁴

§ 408. **Rights of adoptive heirs.**—Wherever adoption is permitted the rule is general and uniform that the adopted child becomes entitled to the same rights of inheritance in the estate of the adopting parents as if it had been born to them during marriage.⁸⁵ Beyond this no general rule that shall be of uniform observance can be formulated, and much diversity exists in the reported cases. It may be said, however, that the *status* thus impressed upon the adopted child continues to its own lineal descendants, and should such child die in the lifetime of its adopted parent its children will succeed to its rights and take the same share as it would have taken had it survived such adopted parent. In other words, for the purposes of suc-

Cofer v. Scroggins, 98 Ala. 342, 39 Am. St. 54.

⁸³ Keegan v. Geraghty, 101 Ill. 26; Watts v. Dull, 184 Ill. 86, 75 Am. St. 141; Shelton v. Wright, 25 Ga. 636; Schafer v. Eneu, 54 Pa. St. 304; Tyler v. Reynolds, 53 Iowa, 146; Furgerson v. Jones, 17 Oreg. 204, 3 L. R. A. 620; *Re Jessup's Estate*, 81 Cal. 408, 6 L. R. A. 594; People v. Congdon, 77 Mich. 351; State v. Clinton, 67 Mo. 380; Wyeth v. Stone, 144 Mass. 441; Pace v. Klink, 51 Ga. 220.

⁸⁴ Ross v. Ross, 129 Mass. 243; Sewal v. Roberts, 115 Mass. 262; Keegan v. Geraghty, 101 Ill. 26; Reinders v. Kapplemann, 68 Mo. 482; Barnum v. Barnum, 42 Md. 241; Smith v. Derr's Adm'r, 34 Pa. St. 126; Singen v. Singen, 45 Ala. 410.

⁸⁵ *Re Newman*, 75 Cal. 213; Lathrop v. Young, 25 Ohio St. 451; Isenrour v. Isenhour, 52 Ind. 328; Morrison v. Sessions, 70 Mich. 297; Rowan's Appeal, 132 Pa. St. 299; Warren v. Prescott, 84 Me. 483.

cession, such children will be regarded the same as if they were the natural grandchildren of such adoptive parent.⁸⁶

But while the act of adoption creates a true legal relation of parent and child it goes no further. Such act does not confer general kinship upon the child nor give to it any capacity to inherit from any other person than the adoptive parent.⁸⁷ Neither are adopted children issue of their adopting parents,⁸⁸ or bodily heirs,⁸⁹ for adoption, whatever other rights it may confer, does not make the adopted child of the blood of its adopter, nor of the blood of his ancestors. Therefore, while an adopted child may inherit from its adopter it cannot inherit through him, nor take as an heir of the ancestor of its adopter.⁹⁰

But as intestate succession is purely a matter of statutory creation it is, of course, within the power of the legislature to extend the rights of inheritance as it may see fit, and while it may not confer inheritable blood it can give inheritable *status* which, for all practical purposes, will amount to the same thing. Thus, it may give the adopted child the same right to inherit directly from the legal descendants of his adopted parent that he would have if actually born to the parent in lawful wedlock, and, when this is done, the adopted child will be a lawful heir of the other children of the adopted parent and may take from them, in case of their prior decease, in the same manner as though he were of their blood.⁹¹

§ 409. **Extra-territorial effect of adoption.**—The extra-territorial effect of adoption is a question upon which the courts are not in full accord and apparently conflicting decisions have been rendered in a number of cases. The conflict in most instances, grows out of the application of the doctrine of personal *status*, and in this, as in other phases of the do-

⁸⁶ *Power v. Hafley*, 85 Ky. 671; *Pace v. Klink*, 51 Ga. 220. But see *contra*, *Sunderland's Estate*, 60 Iowa, 732.

⁸⁷ *Keegan v. Geraghty*, 101 Ill. 26; *Shelton v. Wright*, 25 Ga. 636; *Barnhizer v. Ferrell*, 47 Ind. 335; *Clarkson v. Hatton*, 143 Mo. 47.

⁸⁸ *Phillips v. McConcia*, 59 Ohio St. 1, 69 Am. St. 753.

⁸⁹ *Clarkson v. Hatton*, 143 Mo. 47, 65 Am. St. 635.

⁹⁰ *Phillips v. McConica*, 59 Ohio St. 1; *Wyeth v. Stone*, 144 Mass. 441. But see *Warren v. Prescott*, 84 Me. 483, 30 Am. St. 370.

⁹¹ *Stearns v. Allen*, 183 Mass. 404, 67 N. E. Rep. 349, 97 Am. St. 441; *Sewall v. Roberts*, 115 Mass. 262.

mestic relation, has been productive of much controversy and difference of opinion. The general rule is, that the *status* of a person and the relation in which he stands to another, and by which he is qualified to receive and assert certain rights in that other's property, is fixed by the law of domicile. It is a further rule of general observance that this *status* and capacity shall be recognized, and the rights which it involves upheld, in every other state, so far as they are not inconsistent with its own laws and policy.⁹² Under this rule, and subject to the limitation last mentioned, upon the death of a person, the *status* of those who claim succession to his estate is to be ascertained by the law under which that *status* was acquired. And while it is true that the real estate of an intestate descends according to the law of the place wherein it is situated and to those only that are named by such law to take the same, yet where a person is shown to possess the *status* required for a succession the demand of the law is complied with.⁹³ The statutes of descent are intended only to indicate the manner in which property shall descend, the persons who shall take and the shares they shall receive, and do not, as a rule, undertake to define how the *status* is to be created which gives the capacity to inherit.⁹⁴ There are cases which seem to dissent from this view, particularly where the statute of the forum respecting adoption is different from that of the state where the adoption was effected,⁹⁵ but the general rule, so far as it is possible to formulate a rule, is as above stated.

§ 410. Proof of adoption.—In proving heirship of this kind the death of the ancestor must be shown, as in other cases, and the right of succession established by producing the decree of adoption.⁹⁶ If the decree is not sufficient in itself it

⁹² *Smith v. Kelly*, 23 Miss. 167; *Ross v. Ross*, 129 Mass. 243.

⁹³ *Ross v. Ross*, 129 Mass. 243; *Van Matre v. Sankey*, 148 Ill. 536, 23 L. R. A. 655; *Melvin v. Martin*, 18 R. I. 650; *Johnson's Appeal*, 88 Pa. St. 346; *Pace v. Klink*, 51 Ga. 220.

⁹⁴ *Power v. Hafley*, 85 Ky. 671; *Fasburg v. Rogers*, 114 Mo. 122,

19 L. R. A. 201; *Warren v. Prescott*, 84 Me. 483; *Re Newman's Estate*, 75 Cal. 213; *Humphries v. Davis*, 100 Ind. 274.

⁹⁵ See *Smith v. Derr's Adm'r*, 34 Pa. St. 126; *Barnum v. Barnum*, 42 Md. 241; *Singen v. Singen*, 45 Ala. 410.

⁹⁶ *Quinn v. Quinn*, 5 S. Dak. 328.

will further be necessary, in most cases, to show by the record the facts essential to the exercise of the special jurisdiction under which the decree was entered. To give a decree of adoption any force or effect the court pronouncing same must, as a rule, have acquired jurisdiction (1) over the persons seeking to adopt the child; (2) over the child; and (3) over the parents of such child if living.⁹⁷ In other words, the statute must in all cases be complied with;⁹⁸ its terms and conditions must be fulfilled; and if the specified requisites are not performed or complied with,⁹⁹ then the child cannot inherit from the adoptive parent.¹ The authorities are strenuous in announcing the rule that, where the statute provides specifically the means whereby one sustaining no blood relation to an intestate may inherit his property the rights of inheritance must be acquired in that manner and can be acquired in no other way.²

In ordinary cases the decree of a court of general jurisdiction cannot be questioned collaterally. But, in the exercise of special statutory powers a court of general jurisdiction will be treated as a court of limited jurisdiction, and the jurisdiction must be made to appear from the record itself. Where special powers conferred are exercised in a special manner, and not according to the course of the common law; or where the general powers of a court are exercised over a class of subjects not within its ordinary jurisdiction, upon the per-

⁹⁷ *Furgeson v. Jones*, 17 Oreg. 204, 11 Am. St. 808. And see *Lupple v. Winans*, 37 N. J. L. 245.

⁹⁸ *Tyle v. Reynolds*, 53 Iowa, 146; *Keegan v. Geraghty*, 101 Ill. 26; *Furgeson v. Jones*, 17 Oreg. 204; *Re Jessup's Estate*, 81 Cal. 408.

⁹⁹ Usually the consent of the parents or surviving parent of the child is required, and, if the child is over the age of consent, its own consent as well. Where these requisites are prescribed they are vital. The statute relating to abandoned children will, of course, affect this doctrine in some cases.

¹ *Lupple v. Winans*, 37 N. J. Eq. 245; *Foster v. Waterman*, 124 Mass. 592; *Ex parte Chambers*, 80 Cal. 216.

² *Shearer v. Weaver*, 56 Iowa, 578; *Watts v. Dull*, 184 Ill. 86, 75 Am. St. 141. In the latter case it was held that under a statute providing that a married person cannot adopt a child unless the husband or wife of such person joins in the petition, a married woman cannot adopt a child unless her husband joins in the petition, even though the husband is insane and the wife is his conservator.

formance of prescribed conditions, no presumption of jurisdiction will attend the judgment of the court, and no intentions can be made in its favor.³ All of these principles are generally held to apply in their utmost rigor to proceedings for adoption and the adoptive act is not complete until all of the formal requisites are complied with. Hence, no one can be dispensed with, and if it shall appear that such has been the case, then the attempted act is futile because never consummated, and the adopted child acquires no rights of inheritance in the estate of the adopting parent.⁴

§ 411. Continued—Parental consent.—The concluding observations of the preceding paragraph require some further consideration before dismissing the subject. An interesting and sometimes difficult, question is raised where the consent of the natural parents cannot be obtained but a decree of adoption is yet entered. It is generally conceded that, as adoption involves an entire change of *status*, this change cannot be made without the consent of the parents. It is contended however, that so far as the infant child is concerned the state, as his protector, may make this change for him, and while the rights of the parents should be considered and properly conserved, yet their rights are subject to regulation by the state and if these come into conflict with the paramount interests of the child it is within the power of the state, by legislation, to provide for a separation. And so, in most of the states, an adoption may be legally effected without the parental consent where the conditions are such that the child should be separated from the parent for his own interest as well as for the welfare of the community. In such cases, if the state acquires jurisdiction over the parties it may exercise it for the

³ Watts v. Dull, 184 Ill. 86, 75 Am. St. 141; Galpin v. Page, 18 Wall. (U. S.) 350; Morse v. Presby, 25 N. H. 299; Furgeson v. Jones, 17 Oreg. 204.

⁴ See Furgeson v. Jones, 17 Oreg. 204, 11 Am. St. 808. In this case the proceedings for adoption were held fatally defective because the father of the

child did not consent to the adoption, nor was any notice of the application served upon him; the statutes requiring these acts to be done. And see, also, Lupton v. Winans, 37 N. J. Eq. 245, where the facts were similar. But compare Parsons v. Parsons, 101 Wis. 76; Stearns v. Allen, 183 Mass. 404.

child's benefit, and, as it is not always possible to find the parent, it has been held that it is enough to establish jurisdiction which is binding upon the natural parent if he is given reasonable notice of the pendency of the proceedings and an opportunity to be heard.⁵

§ 412. **Heirship through affinity.**—As previously shown the fundamental idea of heirship at common law was connection by blood, and unless a consanguinious relation could be shown by the claimant the right of inheritance was denied. For many years this remained a cardinal canon of intestate succession, and while the law made provision for a surviving spouse, and gave to both husband and wife a specific interest in the lands of the other, it strenuously refused any recognition of either in the character of an heir. Within comparatively recent years the old rules have been subjected to marked innovations and the statutes of many states have extended the rights of surviving spouses and placed such persons, for many purposes, upon the same footing as surviving relatives by blood. It has been doubted whether one of the spouses who takes property upon the death of the other, under a right dependent solely upon the pre-existing marriage, can with propriety be called an heir, and courts, in some instances, have endeavored to construct some highly artificial distinctions. But, as heirship is strictly a matter of statutory creation, and as an heir is simply one whom the law nominates to take the estate of a person dying intestate, there are no legal difficulties or, at all events, no insurmountable obstacles, in the way of making husband and wife heirs of each other.

In some states it would seem that a surviving spouse for whom a specific provision is made out of the estate left by the deceased consort is regarded as an heir and as taking by descent,⁶ but usually the interest so taken is treated as a new form of succession, for which no very definite name has yet been devised, growing out of the marital relation.⁷ But

⁵ *Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. 894, 77 N. W. Rep. 147; *Stearns v. Allen*, 183 Mass. 404, 97 Am. St. 441, 67 N. E. Rep. 349.

⁶ See *Fletcher v. Holms*, 32 Ind. 497; *Wilcke v. Wilcke*, 102 Iowa, 173, 71 N. W. Rep. 201.

⁷ See *Gauch v. Insurance Co.*, 88 Ill. 251; *Journell v. Leighton*,

whether the interest so acquired be regarded as a descent or a marital right, and whether the person so acquiring same shall be called an heir or a surviving consort, are questions of but little practical importance in the trial of contested land titles, for the language of the statute must, in any event, be the determining factor.

The statutory provisions with respect to surviving husbands and wives and the manner in which they shall take the estate of the deceased consort, are very diverse, but the methods of proof to establish title are practically the same in all of the states, and differ in no material features from those required to prove heirship generally.

In the absence of statutory provision creating *status* a widow is never an heir at law of her deceased husband.⁸

§ 413. **Inheritance of contingent estates.**—Questions of much perplexity are sometimes presented by rival claimants of contingent remainders or under executory devises, who base their rights on inheritance from some of the persons mentioned by the testator. It would seem to be undisputed that contingent remainders and executory devises, at common law, are transmissible to the heirs of the party to whom they are limited, if he should chance to die before the contingency happens.⁹ But those only can take who are in existence when the contingency happens, and the estate falls into possession.¹⁰

The difficulties of the questions that may arise under the foregoing, in contests for title and possession, are well illustrated by the following. A life estate was devised to a woman, A, with remainder to her children, if she should leave any, and to her brother, B, if she should die without issue. The brother, B, died first, intestate and unmarried, leaving only his sister, A, and their mother, C, his next of kin. Subsequently A died, without issue, having devised her property to C. Upon this state of facts the question presented was:

49 Iowa, 601; *Richardson v. Martin*, 55 N. H. 45 *Wilkins v. Walker*, 115 Ala. 590, 22 So. Rep. 476.

⁸ *Rotch v. Loring*, 169 Mass. 190, 47 N. E. Rep. 660.

⁹ *Barnitz v. Casey*, 7 Cranch, (U. S.) 456; *Reid v. Walbach*, 75 Md. 205.

¹⁰ *Garrison v. Hill*, 79 Md. 75.

Do the heirs of B, the remainderman, take the interest which he would have taken had he survived the life tenant, A, or did it descend to A, who was living at the time of his death, and pass under her will to C? In an action of ejectment brought by the heirs of B the court held: that as the contingency,—the death of A, the life tenant without issue—did not occur until after the death of B, the remainderman, then A, not being *in esse* when the contingency happened, of course could neither inherit nor devise, and that the land passed to the heirs of B who were living at the time the contingency happened and the estate fell into possession.¹¹

§ 414. **Declarations and admissions of ancestor.**—It is a general rule, that the declarations of a deceased person in disparagement of his title to lands, made while in possession thereof or while claiming ownership, are admissible in evidence against those who claim in the interest or right of such decedent.¹² So, too, the admissions of an ancestor, which could affect him were he a party, are receivable against his heirs.¹³ This always seems to have been the rule at common law, and it would further seem that such statements were receivable not only as original admissions against the ancestor and all persons who claim title through him, but also as evidence for or against strangers.¹⁴ The statute, in many instances, has confirmed this rule. It may be said that evidence consisting of the alleged declarations of deceased persons is so easily fabricated that it is open to suspicion. This is undoubtedly true, but the objection goes only to the weight that should be given to the testimony, not to its competency.¹⁵ On the other hand, notwithstanding there is some confusion in the decided cases, the general rule seems to be that declarations of a former deceased owner are inadmissible to prove that he had title or was in possession.¹⁶ About all that can be shown in a matter of this kind are declarations explanatory of the char-

¹¹ *Garrison v. Hill*, 79 Md. 75, 47 Am. St. 363.

¹² *McLeod v. Swain*, 87 Ga. 156.

¹³ *Terry v. Rodahan*, 79 Ga. 278; *Burnett v. Harrington*, 70 Tex. 213.

¹⁴ See 1 Taylor, Evidence, § 684.

¹⁵ *Williams' Estate*, 128 Cal. 552, 61 Pac. Rep. 670.

¹⁶ *High v. Pancake*, 42 W. Va. 602, 26 S. E. Rep. 536.

acter of possession, and these, it seems, are admissible only upon the question as to whether such possession was adverse.¹⁷ In no event, however, can such declarations be permitted to extend to the source of the declarant's title nor the manner in which he acquired the property.¹⁸

¹⁷ *High v. Pancake*, 42 W. Va. 602; *Ward v. Cochran*, 71 Fed. Rep. 127. ¹⁸ *McLeod v. Bishop*, 110 Ala. 640, 20 So. Rep. 130.

CHAPTER XII.

TITLE BY LIMITATION AND POSSESSION.

- I. NATURE AND REQUISITES.
- II. DISPUTED BOUNDARIES.
- III. RELATION OF PARTIES.
- IV. THE STATE AND ITS AGENCIES.

I. NATURE AND REQUISITES.

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| § 415. Generally considered. | § 428. Continued — Conflicting theories. |
| 416. Derivation of the right. | 429. Adverse possession by one of several occupants. |
| 417. Immemorial usage. | 430. Nature of occupancy. |
| 418. Limitation. | 431. Occupation under license. |
| 419. Disseizin. | 432. Payment of taxes. |
| 420. Requisites and sufficiency. | 433. Declarations and admissions. |
| 421. Continued — Statutory modifications. | 434. Interruption. |
| 422. Claim and color of title distinguished. | 435. Entry by owner. |
| 423. Good and bad faith. | 436. Effect of absence from state. |
| 424. Entry under void deed. | 437. Abandonment. |
| 425. Constructive possession. | 438. Presumptions. |
| 426. Mixed possession. | 439. Mines and sub-strata. |
| 427. Tacking. | |

§ 415. Generally considered.—Probably no species of title is more frequently resorted to by parties claiming proprietary rights in land than that which the law raises as an estoppel against those who have failed to assert their claims within the specific periods provided by the statute. The subject usually receives a large share of attention from the elementary writers on ejectment and its magnitude and importance justifies a special treatment in any work devoted to this branch of the law.

While to support ejectment the plaintiff must have title at the commencement of the suit, yet it by no means follows that

such title should be susceptible of demonstration by documentary proof, for continuous adverse possession of land may ripen into a title as firm and unassailable as though acquired by valid grant.¹⁹ Hence, if a party holds possession of land during the full period of limitation, under such circumstances as would make a valid defense against claims of others, he will have acquired a title which he may actively assert with as much effect as if it had been derived through deed,²⁰ and if the limits of his possession can be shown he may maintain ejectment for an invasion thereof as against all persons whose rights have not been saved.²¹

In practice, however, it is usually the defendant and not the plaintiff who seeks to avail himself of rights derived under the statute of limitations, and in a very large proportion of the cases where the defendant offers an affirmative defense this is the form relied upon. But where a defendant seeks to do more than negative the plaintiff's proofs, and particularly where he offers an affirmative defense by asserting title in himself, he thereby becomes a claimant and the same rules will apply to the defense as to the plaintiff's claim.

In all cases where title is claimed by virtue of an adverse possession the burden of proof is thrown upon the party asserting such title,²² and this is so whether the title is asserted either offensively or defensively when it is opposed by a claim under the legal title. The evidence must be strictly construed and all of the presumptions are in favor of the true owner.²³ Fur-

¹⁹ *Arbuckle v. Ward*, 29 Vt. 43; *Nelson v. Brodhack*, 44 Mo. 596; *Normant v. Eureka Co.*, 98 Ala. 181.

²⁰ *Jacks v. Chaffin*, 34 Ark. 534; *Anderson v. Melear*, 56 Ala. 621; *Joy v. Stump*, 14 Oreg. 361; *Dean v. Goddard*, 55 Minn. 290; *Parkersburg v. Schultz*, 43 W. Va. 470.

²¹ So held where the demandant claimed under a void patent from the United States. *Logan v. Jelks*, 34 Ark. 547. And see *Donahue v. Railroad Co.*, 165 Ill.

640; *Lantry v. Wolff*, 49 Neb. 374; *Sutton v. Pollard*, 96 Ky. 640; *Parkersburg v. Schultz*, 43 W. Va. 470; *Cave v. Anderson*, 50 S. C. 293; *Jones v. Brandon*, 59 Miss. 585; *Barnes v. Light*, 116 N. Y. 34; *Hall v. Caperton*, 87 Ala. 285.

²² *McConnell v. Day*, 61 Ark. 464, 33 S. W. Rep. 731; *Barrs v. Brace*, 38 Fla. 265; *Wells v. Austin*, 59 Vt. 157.

²³ *Fairfield v. Barrette*, 78 Wis. 463; *Levy v. Cox*, 22 Fla. 546.

ther, where proof of this kind is offered it must be complete,²⁴ that is, full compliance with statutory requisites must be shown,²⁵ and, as a rule, evidence of an adverse possession for a period less than the prescribed time, is not a circumstance to go to the jury as tending to show title in an action of ejectment.²⁶

It is not necessary that the possession of a defendant in ejectment should be adverse as against third parties; it is enough if it is adverse to the plaintiff, and when this is satisfactorily made to appear the bar of the statute will be interposed if the necessary time has elapsed.²⁷ In every case, however, this latter fact must be established by affirmative proof, as no presumption arises that an adverse possession shown to have once existed continues for a sufficient time to confer title.²⁸

§ 416. Derivation of the right.—It was a favorite theory with the medieval lawyers that, by the law of nature, occupancy not only gave a right to the temporary use of the soil, but also a permanent property in the substance of the earth itself, and hence, possession was the first act from which the right of property was derived. It has therefore become an established rule of law, in every civilized country, that long, peaceful and continuous possession of land will give a title to the same, or, at least, will confirm such a title in the occupant as will preclude an impeachment or denial by a rival claimant. This mode of acquisition is generally known as *prescription*,²⁹ and rests upon the presumption that he who has had a quiet

²⁴ Wells v. Austin, 59 Vt. 157, 10 Atl. Rep. 405.

²⁵ Jarvis v. Grafton, 44 W. Va. 453; Nicklase v. Dickerson, 65 Ark. 422; Lewon v. Heath, 53 Neb. 707.

²⁶ Bernhardt v. Brown, 122 N. C. 587.

²⁷ Skipwith v. Martin, 50 Ark. 141, 6 S. W. Rep. 514.

²⁸ Woods v. Hull, 90 Tex. 228, 38 S. W. Rep. 165.

²⁹ By the common law of England a prescription can only be

made with respect to incorporeal hereditaments, such as rents, commons, ways, etc., for it is said that no prescription can give title to lands or other corporeal inheritances, of which more certain evidences may be had. See 2 Black. Com. 264. But by statute (2 and 3 Will. IV. c. 71, s. 2) it was extended to lands in accordance with the text and in the sense thus used it has long been employed in the United States.

and uninterrupted possession of a thing for a long period of time, must have a just claim thereto, without which he would not have been suffered to continue in its possession. Such possession raises the further presumption of an acquiescence on the part of all other claimants, and this, in turn, that some reason exists for which their claims were forborne.³⁰

The ideas involved in the common-law doctrine of prescription have been largely subordinated in modern times to the statutory doctrine of *limitation*. This seems to have been regarded by the earlier writers as a sort of prescription, differing from the prescription of immemorial usage only in that instead of giving an estate to the occupant it extinguished the remedies that others might have asserted against him, and hence, it was frequently called *negative* prescription.³¹ In point of time it is as old as the prescription arising from immemorial usage, finding mention in the oldest books,³² and, in modern practice has entirely superseded the doctrines of that form of prescription except for easements, or other incorporeal rights in special cases.

§ 417. *Immemorial usage*.—The old books carefully distinguish between prescriptive rights which rest on immemorial usage, or what is termed *positive* prescription, and such as arise under the statute of limitations, which is called *negative* prescription, and in England the subject has at different times received much earnest and careful attention from both the courts and legal writers. The refinements of the old law have little or no application, however, to the land system of the United States and the subtle distinction between those things which lie in grant and those which lie in livery, upon which much of the ancient theory was built, no longer obtains. But the spirit of the ancient practice has survived and still exerts an influence in judicial proceedings, and from immemorial usage the law now, as formerly, will presume a grant and a lawful beginning of possession. In the litigation of titles it must frequently happen that record or documentary evidence of original investiture has been lost or destroyed. In such cases, upon evidence of use and enjoyment for a time

³⁰ Cruise, Dig. tit. XXXI, ch. 1.

³² See Bract. lib. II, c. 22.

³¹ 3 Cruise, Dig., ch. II.

beyond the period of legal memory,³³ a presumption is permitted to be raised to supply the loss of the grant and thus, by secondary evidence is established the fact of its former existence and the title of the claimant under it.³⁴

The period of legal memory or a time "whereof the memory of man runneth not to the contrary" is now little more than a term of art, and is generally made to coincide with the fixed periods of limitation.

§ 418. **Limitation.**—The theory of limitation, unlike that of prescription, does not rest on presumptions but on legal policy, and is supported by positive and rigid rules. In its essence it is a denial of the right to enter upon lands, in the adverse occupancy of another, after the expiration of a fixed period of time. Its object is to prevent litigation and secure the quiet and repose of titles. It is a continual and decisive notice to owners that, if they allow others to adversely occupy and use their land for such time as the statute has limited they must be deemed to have acquiesced in the assertion of the occupant's claim, and to have abandoned all opposition thereto. There may be exceptional instances in which the character of the party in whom the title is vested will prevent the operation of the statute, as where one is laboring under legal disability, but unless the facts clearly bring him within the exception the rule is absolute, unbending and unyielding.³⁵

At the present time the jurists are somewhat divided with respect to the essential character of statutes of limitation. The old theory, long maintained, is that such statutes operate only

³³ It does not seem that acquisitive prescription for land was employed in the early English law but merely a limitation of actions. Before the year 1237, claimants had been allowed to go back to a seisin on the day in 1135 when Henry I. died; then they were restricted to the day in 1154 when Henry II. was crowned; in 1275 the boundary was moved forward to the coronation of Richard I. in 1189 and

there it remained during the rest of the middle ages. Pollock and Mait. Hist. Eng. Law, vol. 2, p. 81.

³⁴ *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. Rep. 599, 30 L. R. A. 747; *Hasson v. Klee*, 181 Pa. 117; *Sulphur Mines Co. v. Thompson*, 93 Va. 293.

³⁵ *Northern Pac. Ry. Co. v. Townsend*, 84 Minn. 152, 87 Am. St. 342, 86 N. W. Rep. 1007.

to secure the quiet and repose of titles by taking away the right of entry. They are not regarded as actually conferring title nor as vesting an estate in the adverse occupant. Neither does the statute, as at present generally framed purport to vest a title but simply denies the right to question the adverse occupant's claim. But as the legal effect of these statutes is virtually to establish a right of property in the adverse occupant, it is now customary to speak of title as acquired by adverse possession, and courts, in many instances, have held that the legal effect of such possession is not only to bar the remedy of the owner but to actually work a divestiture of his title and to vest it in the adverse occupant.³⁶ The old theory is supported by sound legal reason, while the later notion, that mere occupation with the presumed acquiescence of the owner is itself an actual transfer of title, is opposed to all of the rules of conveyancing as well as the general theories of the law respecting the transfer of proprietary rights. However, the theory involved is a matter of minor importance, for under either theory the result is the same. If the remedy is barred the occupant is secure in his possession, and, where his proprietary right and claim of title is beyond dispute, it follows that he may assert it, either offensively or defensively whenever occasion may require.³⁷

§ 419. *Disseizin*.—The basis of a title by adverse possession and limitation is technically termed a *disseizin*; that is, the ouster of the rightful owner from the seizin or estate in the land, and the commencement of a new estate in the wrongdoer. Every dispossession is not a *disseizin*, however, and in order to make an entry the foundation or commencement of a new title the possession taken by the disseizor must be hostile or adverse in its character, importing a denial of the original owner's title to the land claimed. Whether there is or is not actual *disseizin* must depend upon the character of the

³⁶ See *Dean v. Goddard*, 55 Minn. 290; *Baker v. Oakwood*, 123 N. Y. 16; *Kiltron v. Buel*, 168 Mo. 622; *Bicknell v. Comstock*, 113 U. S. 149; *Watson v. Jeffrey*, 39 N. J. Eq. 62.

³⁷ *Jacks v. Chaffin*, 34 Ark. 534; *Kepley v. Scully*, 185 Ill. 52; *Green v. Couse*, 127 N. Y. 386, 24 Am. St. 458, 28 N. E. Rep. 15; *Miller v. Cramer*, 48 S. C. 282, 26 S. E. Rep. 657; *Jones v. Brandon*, 59 Miss. 535.

act done, and the intention of the doer. To make a disseizin in fact there must be an intention on the part of the person assuming possession to assert title in himself to a definite parcel, or there must be overt acts which leave no room for inquiry with respect to intention, and which amount to actual ouster in spite of the real owner.³⁸ It will be seen, therefore, that while it is not difficult to say generally what, as a matter of law, constitutes an adverse possession, yet, as to what will evidence the necessary facts to enable a court in a given case to say there is an adverse possession is far from easy,³⁹ and probably no subject connected with the law of real property has been productive of a larger volume or greater diversity of judicial decision. The question is said to be a compound of law and fact and every case in which it is involved must be determined by its own circumstances.⁴⁰

The character of the possession depends much on the nature and situation of the property, and the uses to which it can be applied,⁴¹ and no rule of general application can be formulated. What would constitute a disseizin and adverse user in a populous locality may not apply in a sparsely settled district and the conditions that would meet the requirements in the country may be inadequate in a city.⁴² About the only statement that can with any degree of certainty be made is, that if the possession comports with the ordinary use and management of similar lands by their owners, it furnishes evidence of a disseizin and adverse claim.⁴³

³⁸ Worcester v. Lord, 56 Me. 265; Tourtelotte v. Pearce, 27 Neb. 57; Borel v. Rollins, 30 Cal. 409; Raymond v. Morrison, 59 Iowa, 371.

³⁹ Illinois Steel Co. v. Bilot, 109 Wis. 418, 85 N. W. Rep. 402, 83 Am. St. 905; Murphy v. Doyle, 37 Minn. 113. The survey of a lot, the driving of stakes around it, the pasting of a sign bearing the name of one claiming the ownership, the payment of taxes, and an offer of sale by him and his agents, are admissible in ejectment as evidence of claim of

ownership and of actual possession. Gist v. Beaumont, 104 Ala. 347.

⁴⁰ Draper v. Shoat, 25 Mo. 197; Normant v. Eureka Co., 98 Ala. 181.

⁴¹ Clark v. Potter, 32 Ohio St. 64; Sauers v. Giddings, 90 Mich. 50, 51 N. W. Rep. 265; Clement v. Perry, 34 Iowa, 564; Curtis v. Campbell, 54 Mich. 340.

⁴² Draper v. Shoot, 25 Mo. 197; Hughes v. Anderson, 79 Ala. 209; Richards v. Smith, 67 Tex. 610.

⁴³ Downing v. Mayes, 153 Ill. 330; Holtzman v. Douglas, 168

In every event mere possession of land is not *prima facie* adverse to the title of the true owner, and all of the presumptions are that the occupancy is in subordination to such title.⁴⁴ Therefore, where a possession is claimed to be adverse the acts of the disseizor must be strictly construed and the character of the possession clearly shown.⁴⁵ The claim of right must always be present,⁴⁶ and its existence is a question of fact to be determined by the conduct and declarations of the party in possession.⁴⁷

§ 420. **Requisites and sufficiency.**—It is a fundamental doctrine in this branch of the law that a possession of land, to be adverse, must be so open, notorious, and important as to give notice to all parties interested that a claim of right is intended thereby; that the right of the true owner is invaded intentionally, and with a purpose to assert a claim of title adversely to his; and, to furnish the basis of a substantial title, it must extend in unbroken continuity over the entire period prescribed by the statute of limitations.⁴⁸ This element of peaceful continuity is, perhaps, more distinctly material in conferring title by adverse possession than any other,⁴⁹ unless

U. S. 278; Clark v. Potter, 32 Ohio St. 64; Brett v. Farr, 66 Iowa, 684; Beecher v. Galvin, 71 Mich. 391; Webber v. Clarke, 74 Cal. 11; Roe v. Strong, 119 N. Y. 316; Normant v. Eureka Co., 98 Ala. 181; Sauers v. Giddings, 90 Mich. 50.

⁴⁴ Robinson v. Allison, 97 Ala. 596; Preble v. Railroad Co., 85 Me. 260; Childs v. Nelson, 69 Wis. 125; Heller v. Cohen, 154 N. Y. 299.

⁴⁵ Creekmur v. Creekmur, 75 W. Va. 430; Hicks v. Tedericks, 9 Lea (Tenn.), 491; Wilson v. Blake, 53 Vt. 305; Roberts v. Baumgarten, 51 N. Y. S. C. 482; O'Boyle v. McHugh, 66 Minn. 390.

⁴⁶ Parkersburg v. Schultz, 43 W. Va. 470.

⁴⁷ Normant v. Eureka Co., 98 Ala. 181; Schwalback v. Railway

Co., 69 Wis. 292; Alsup v. Stewart, 194 Ill. 595; Baber v. Henderson, 156 Mo. 566; Bond v. O'Gara, 177 Mass. 139; Fitchburg R. R. Co. v. Page, 131 Mass. 391; McDonald v. Fox, 20 Nev. 364.

⁴⁸ Carrol v. Gillien, 33 Ga. 539; Beatty v. Mason, 30 Md. 409; Dixon v. Cook, 47 Miss. 220; Laramore v. Minish, 43 Ga. 283; Bowman v. Lee, 48 Mo. 335; Cahoun v. Cook, 9 Pa. St. 226; Cahill v. Palmer, 45 N. Y. 484; Booth v. Small, 23 Iowa, 177; Ringo v. Woodruff, 43 Ark. 469; McDonald v. Fox, 20 Nev. 364; Mauldin v. Cox, 67 Cal. 387; Shaw v. Schoonover, 130 Ill. 448.

⁴⁹ Groft v. Weekland, 34 Pa. St. 308; Williams v. Wallace, 78 N. C. 354; Shiels v. Roberts, 64 Ga. 370; Robbins v. Moore, 129

it be the corresponding element of notorious hostility, and there must be an actual occupancy, as distinguished from a merely constructive possession, of a part or all of the lands claimed.⁵⁰

Occasional entries upon land and the exercise of occasional acts of ownership,⁵¹ no matter how clearly they may indicate a purpose to claim title and assert dominion over the property, will not be sufficient to satisfy the requirements of the law with respect to continued use or support a claim of title by prescription or limitation.⁵² Such entries can be regarded only as acts of trespass,⁵³ and, in like manner, different entries at different times, by different persons, between whom there is no privity or connected claim of rightful holding, are but a succession of trespasses and inadequate to furnish a basis of claim against the paper title.⁵⁴

A voluntary and intentional abandonment, irrespective of the length of its duration, constitutes such a breach of continuity of possession as to render inoperative the defense of adverse enjoyment,⁵⁵ and, in like manner, if there has been a disseizin or ouster by another adverse occupier a discontinuance will be effected.⁵⁶ It may be said, however, that as to

Ill. 30; *Normant v. Eureka Co.*, 98 Ala. 181.

⁵⁰ *Cook v. Clinton*, 64 Mich. 309; *Willson v. McEwan*, 7 Oreg. 87; *Bracken v. Jones*, 63 Tex. 184.

⁵¹ *Stewart v. Tucker*, 106 Ala. 319; *Strong v. Powell*, 92 Ga. 591; *Mission v. Cronin*, 143 N. Y. 524. The occasional cutting and carrying away of rails and firewood from land chiefly valuable for timber is not such an occupancy as will create a title by adverse possession. *Wheeler v. Taylor*, 32 Oreg. 421. Neither is the cutting of natural hay, or the pasturing of stock in common with others. *Sage v. Larson*, 69 Minn. 122.

⁵² *Ruffin v. Overby*, 105 N. C. 78; *Foulke v. Bond*, 41 N. J. L.

527; *Olewine v. Messmore*, 128 Pa. St. 470; *St. Croix, etc. Co. v. Ritchie*, 78 Wis. 492; *Price v. Brown*, 101 N. Y. 669; *Bazille v. Murray*, 40 Minn. 48; *Cook v. Farrah*, 105 Mo. 492; *Robbins v. Moore*, 129 Ill. 30; *Scott v. Mills*, 49 Ark. 266.

⁵³ *Austin v. Holt*, 32 Wis. 478; *Bazille v. Murray*, 40 Minn. 48.

⁵⁴ *Ross v. Goodwin*, 88 Ala. 390; *Sherin v. Brackett*, 36 Minn. 152; *Hicks v. Tedericks*, 9 Lea (Tenn.), 491.

⁵⁵ *Doyle v. Wade*, 23 Fla. 90; *Harms v. Kransz*, 167 Ill. 421; *Malloy v. Bruden*, 86 N. C. 251; *Parkersburg v. Schultz*, 43 W. Va. 470; *Hollingsworth v. Sherman*, 81 Va. 668.

⁵⁶ *Ross v. Goodwin*, 88 Ala. 390, 6 So. Rep. 682; *Warren v.*

what is or shall be considered continuous occupancy and possession must, in a great degree, rest upon and be determined by the special circumstances of each case,⁵⁷ and in the determination of the question the situation and condition of the property, the uses to which it is adapted, the circumstances attending the occupancy, as well as the intentions of the party in regard to it, should all be considered.⁵⁸

The element of notorious hostility is an equally indispensable ingredient of every title resting on the legal presumption raised by possession and limitation.⁵⁹ There must not only be a continuity of use but such a publicity attending the same as to leave no room for doubt by the person whose rights are invaded that his title is disputed.⁶⁰ To accomplish this no particular act or series of acts is necessary provided the land is so used as to clearly demonstrate an intention to claim ownership, but nothing of a stealthy or clandestine nature will serve to work a disseizin; the occupancy must be open; the acts must be visible and of so public a character that the owner may be presumed to have notice of them and the extent of the claim which they serve to indicate.⁶¹

It is not necessary, however, to prove knowledge on the part of the owner. If he has, in fact, been ousted of possession and the ouster has continued uninterruptedly for the statutory period, such possession is presumed to have been held with his knowledge.⁶² In other words, it is not necessary that the

Frederichs, 76 Tex. 647; Louisville, etc. Ry. Co. v. Philyaw, 88 Ala. 264.

⁵⁷ Costello v. Edson, 44 Minn. 135; Whitaker v. Shooting Club, 102 Mich. 454.

⁵⁸ Webb v. Richardson, 42 Vt. 465; Sauers v. Giddings, 90 Mich. 50, 51 N. W. Rep. 265; Woods v. Montevallo, etc. Co., 84 Ala. 560.

⁵⁹ Hicklin v. McClear, 18 Oreg. 126; Thompson v. Pioche, 44 Cal. 508; Denham v. Holeman, 26 Ga. 182; Sparrow v. Hovey, 44 Mich. 63; Grant v. Fowler, 39 N. H. 101; Bracken v. Jones, 63 Tex.

184; Ringo v. Woodruff, 43 Ark. 469.

⁶⁰ Ford v. Wilson, 35 Miss. 490; Hutton v. Schumaker, 21 Cal. 453; O'Hara v. Richardson, 46 Pa. St. 285; Royal v. Lisle, 15 Ga. 545.

⁶¹ Potts v. Coleman, 67 Ala. 221; Denham v. Holeman, 26 Ga. 182; Worcester v. Lord, 56 Me. 265; Langworthy v. Myers, 4 Iowa, 18; Cook v. Babcock, 11 Cush. (Mass.) 206; Simon v. Richard, 42 La. Ann. 842.

⁶² Carney v. Hennessey, 74 Conn. 107, 92 Am. St. 199, 49

real owner should actually know of the hostile possession; it is sufficient if the acts of the adverse claimant are such as to furnish such owner with the means of knowledge.⁶³

§ 421. Continued—Statutory modifications.—A statutory distinction is made in some states between a claim of title founded upon some written instrument or judgment, and an actual, continued occupation under claim of title, exclusive of any other right, but not founded upon any written instrument, judgment or decree; and the period of occupancy in the latter case must be continued much longer than in the former. Thus, in the first instance, the title may become perfect and indefeasible at the end of ten years, while in the latter the period of legal memory, or the full statutory limit, must have run to warrant the presumption of an original, valid entry, and the loss or destruction of the muniments that establish the occupant's right to the soil. The character of the possession, too, may be vastly different under the two claims; as, in the first instance, a partial occupancy only is required, such partial occupancy drawing to it constructively the possession of all the land mentioned in the instrument under which the claim is made, while in the latter the adverse holding extends only to so much of the premises as may have been actually occupied.⁶⁴ But in either event, to constitute a bar to the assertion of the legal title, the possession must be hostile,⁶⁵ and not a mere trespass,⁶⁶ and must also be visible,⁶⁷ continuous,⁶⁸ no-

Atl. Rep. 910; *Wilson v. William*, 52 Miss. 487; *King v. Carmichael*, 136 Ind. 20, 43 Am. St. 303, 35 N. E. Rep. 509.

⁶³ *Lampman v. Van Alstyne*, 94 Wis. 417, 69 N. W. Rep. 171; *Miller v. Rosenberger*, 144 Mo. 292.

⁶⁴ What acts are sufficient to constitute possession are matters of local statutory regulation, but, as a rule, there must be either cultivation or improvement; protection by a substantial enclosure; and a use of the premises, if not enclosed, for the

supply of fuel, or husbandry, or the ordinary use of the occupants. See *Hicks v. Tedericks*, 9 Lea (Tenn.), 491; *East Hampton Trustees v. Kirk*, 84 N. Y. 215.

⁶⁵ *Turney v. Chamberlain*, 15 Ill. 271; *Thompson v. Felton*, 54 Cal. 547.

⁶⁶ *Humbert v. Trinity Ch.*, 24 Wend. 587; *Cahill v. Palmer*, 45 N. Y. 479.

⁶⁷ *Irving v. Brownell*, 11 Ill. 402.

⁶⁸ *Jackson v. Berner*, 48 Ill. 203.

torious,⁶⁹ definite⁷⁰ and inconsistent with the claim of others,⁷¹ while the claim of right accompanying such possession must not have originated in fraud.⁷² These are the universally recognized elements that must enter into every adverse holding and unless they are present the settled principles of law require us to consider the true owner as constructively in possession of the land to which he holds the title.⁷³ A clandestine entry or possession will never serve to set the statute in motion, for in order to bar the true owner from asserting his title, he must have actual or constructive notice of the instrument under which the adverse claimant enters, or knowledge, or the means of knowledge, of such occupation and claim of right,⁷⁴ and the entry must be made and the possession continued under such circumstances as to enable such true owner, by the use of reasonable diligence, to ascertain the fact of entry and the right and claim of the party making it.⁷⁵

§ 422. **Claim and color of title distinguished.**—The basic element of every adverse title is a claim of right. Without this the possession of land cannot be adverse, and the elements

⁶⁹ *McClellan v. Kellogg*, 17 Ill. 498; *Dixon v. Cook*, 47 Miss. 220.

⁷⁰ *Fugate v. Pierce*, 49 Mo. 441; *Grube v. Wells*, 34 Iowa, 148.

⁷¹ *Ambrose v. Raley*, 58 Ill. 506; *Sparrow v. Hovey*, 44 Mich. 63.

⁷² *Moody v. Moody*, 16 Hun (N. Y.), 189; *Laramore v. Minish*, 43 Ga. 282. The question whether one who holds by color of title holds in good faith or bad, depends upon the purpose with which he acquired the title relied on, and the reliance placed upon it. If the holder received it, knowing it to be worthless, or in fraud of the owner's rights, it cannot be said to be held in good faith. Still, many things that may be sufficient to destroy the presumption of good faith may be insufficient to prevent the

deed from being color of title. See *Hardin v. Gouverneur*, 69 Ill. 140; *Hall v. Mooring*, 27 La. Ann. 596.

⁷³ *Bliss v. Johnson*, 94 N. Y. 235; *Doe v. Thompson*, 5 Cow. (N. Y.) 371; *Davis v. Howard*, 172 Ill. 340.

⁷⁴ *Fugate v. Pierce*, 49 Mo. 441; *Crispen v. Hannavan*, 50 Mo. 536; *Thompson v. Pioche*, 44 Cal. 508; *Nowlin v. Reynolds*, 25 Gratt. (Va.) 137; *Denham v. Holeman*, 26 Ga. 182; *Lucas v. Daniels*, 34 Ala. 188.

⁷⁵ *Soule v. Barlow*, 49 Vt. 329; *Brown v. Cockerell*, 33 Ala. 151; *Simon v. Richard*, 42 La. Ann. 842; *McDonald v. Fox*, 20 Nev. 364; *Shaw v. Schoonover*, 130 Ill. 448; *Russell v. Davis*, 38 Conn. 562; *McLean v. Smith*, 106 N. C. 172.

of notoriety, continuity, etc., are but incidents which go to establish this primary fact of claim. A confusion seems to exist, however, arising from the interchangeable use of the terms "color" and "claim," which, as a matter of law, are entirely dissimilar in character, and may exist separate and independent of each other as well as in conjunction. A *claim* of title is the primary assertion of the right by which the occupier holds: it may be evidenced by a writing or it may rest wholly in parol;⁷⁶ it may consist of oral declarations or be presumed from acts, and while there are authorities which hold that it must be made in good faith yet this would seem to be an immaterial circumstance where the statute has run its full course. To constitute *color* of title there must, as a rule, be a deed or document of some kind.

What amounts to a color of title, however, is still an open and unsettled question, notwithstanding numerous decisions defining its character exist in all the states as well as in the federal courts, and although in a few instances it has been held that documentary evidence is not required to support a claim under color of title,⁷⁷ the weight of authority and opinion indicates that a written instrument is necessary, so far good in appearance as to be consistent with the idea of good faith, and purporting on its face to convey a title.⁷⁸ The definitions in the books, though widely divergent in many particulars, yet agree in the main on these points. A claim of heirship has been held to come within the term, the supposed inheritance forming the "color,"⁷⁹ while the same effect has been given to a sale or gift of land by parol,⁸⁰ the reason-

⁷⁶ *Hamilton v. Wright*, 30 Iowa, 486; *Ford v. Wilson*, 35 Miss. 490; *Royal v. Lisle*, 15 Ga. 545.

⁷⁷ *Cooper v. Ord*, 60 Mo. 431; *Teabout v. Daniels*, 38 Iowa, 158; *Lebanon Mining Co. v. Rogers*, 8 Colo. 34.

⁷⁸ *Baker v. Swan*, 32 Md. 355; *Kruse v. Wilson*, 79 Ill. 240; *Stark v. Starr*, 1 Sawyer (C. Ct.) 20; *Gittens v. Lowry*, 15 Ga.

338; *Williams v. Scott*, 122 N. C. 545; *Doyle v. Wade*, 23 Fla. 90.

⁷⁹ *McCall v. Niely*, 8 Watts (Pa.), 72. And see *Cooper v. Ord*, 60 Mo. 420; *Teabout v. Daniels*, 38 Iowa, 158; *Holbrook v. Forsythe*, 112 Ill. 306. But see *contra*, *Williams v. Scott*, 122 N. C. 545.

⁸⁰ *Sumner v. Stevens*, 6 Met. (Mass.) 337; *Harvey v. Harvey*, 26 S. C. 608.

ing in such cases being that where a party is in possession under and pursuant to a state of facts which, of themselves, show the character and extent of his entry, such facts practically perform the office of color of title.⁸¹ It is contended, in support of this view, that where facts are sufficient to evidence the character of the entry and the extent of the claim, everything that color of title could show has been presented, and that possession under such facts would furnish constructive notice of them to all persons interested.⁸² But this reasoning, however plausible it may appear, is not in accord with the generally received theories of the essence of this ingredient of adverse title.⁸³

A void deed may give color of title and operate to fix and define the boundaries of an actual possession,⁸⁴ and, generally, any instrument of conveyance, however inadequate to transfer title, may yet serve as color of title to support a claim of adverse possession.⁸⁵ In order, however, to impart a color of title to lands beyond the limits of the portion actually occupied the instrument relied upon must contain a description of the land,⁸⁶ and if there is no description or boundary by which the location of land can be ascertained or the limits of possession defined, the instrument will be unavailing and cannot constitute color of title.⁸⁷

The effect of a possession under color of title is to confer adverse rights co-extensive with the boundaries described in the instrument under which the claim of title is made,⁸⁸ in the

⁸¹ *Bell v. Longworth*, 6 Ind. 273.

⁸² See further *Hamilton v. Wright*, 30 Iowa, 480; *Miller v. Davis*, 106 Mich. 300; *King v. Rowan*, 10 Heisk. (Tenn.) 675.

⁸³ *Williams v. Scott*, 122 N. C. 545.

⁸⁴ *Doe v. Clayton*, 81 Ala. 391; *Stater v. Meadows*, 68 Iowa, 507; *Hartman v. Nettles*, 64 Miss. 495; *Packard v. Moss*, 68 Cal. 123; *Twohig v. Leamer*, 48 Neb. 247; *Bennett v. Land & I. Co.*, 23 Colo. 470; 48 Pac. Rep. 812.

⁸⁵ *Safford v. Stubbs*, 117 Ill.

389; *Randolph v. Casey*, 43 W. Va. 289; *McNeill v. Fuller*, 121 N. C. 209; *Burgett v. Tallaferra*, 118 Ill. 503; *Packard v. Moss*, 68 Cal. 123; *Swift v. Mulkey*, 14 Oreg. 59; *Bartlett v. Ambrose*, 78 Fed. Rep. 839.

⁸⁶ *Wilson v. Johnson*, 145 Ind. 40, 43 N. E. Rep. 930; *Elofrson v. Lindsay*, 90 Wis. 203.

⁸⁷ *Blakey v. Morris*, 89 Va. 717; *Dubuque v. Coman*, 64 Conn. 475.

⁸⁸ *Smith v. Keyser*, 115 Ala. 455; *Libbey v. Young*, 103 Iowa, 258, 72 N. W. Rep. 520; *Peoria*,

absence of any actual possession by the true owner,⁸⁹ whereas the possession of one entering and holding under a mere claim of title, without more, is confined to the land in his actual occupation.⁹⁰ Hence, the question of the manner of holding often becomes of great importance, and it is to be regretted that more definite and uniform ideas concerning the essential character of color of title do not prevail.

§ 423. **Good and bad faith.**—It is not proposed to extend the inquiries of this chapter from the domain of law to that of morals, nor to attempt any definitions of ethics. Yet the persistency of the antithetical terms “good” and “bad”, when applied to matters of belief respecting title, which is so observable in both the decisions and the writings of the rudimentary expounders of the law, compels some allusion thereto. The terms themselves do not readily admit of definition. Indeed, exact definitions in law are practically impossible, for “good faith”, like “fraud” and similar expressions, is something which courts have generally refused to define. We can only resort to generalities when we attempt to express the essence of terms of this character, and generalities, however much they may serve to adorn ordinary discourse, are without much force or effect in legal argument. We may be able to perceive those things which shock the moral sense when they are presented in concrete form, and courts will act from the cognitions so received, but considered abstractly it is difficult, if not impossible, to say in just what the essence of bad faith consists.

In disputes concerning the title to land the question of good faith arises most frequently where claims are made under color of title. The general doctrines have already been stated, and, as has been seen, an occupation under color of title must, as a rule, be commenced in “good faith.” But this expression is now largely a term of art. Where there is no actual fraud;

etc. *R. Co. v. Tamplin*, 156 Ill. 285; *Johns v. McKibben*, 156 Ill. 71, 40 N. E. Rep. 449.

⁸⁹ *Anderson v. Jackson*, 69 Tex. 346; *Peoria, etc. R. Co. v. Tamplin*, 156 Ill. 285.

⁹⁰ *Parkersburg v. Schultz*, 43 W. Va. 470, 27 S. E. Rep. 255; *Porter v. Miller*, 76 Tex. 593; *Doyle v. Wade*, 23 Fla. 90.

and no proof showing that the color of title was acquired in bad faith, which virtually means in or by fraud, it must be held to have been acquired in good faith.⁹¹ Constructive, or even actual, notice of irregularities does not necessarily impute bad faith or fraud to the party chargeable with notice,⁹² and, generally, unless there is affirmative proof to show that the claimant designed to defraud the person having the better title his color of title is not impeached.⁹³

It may be stated, therefore, as a rule, that good faith will be presumed until rebutted by proof, or, stated in other words, the legal presumption is that all conveyances are made in good faith and not fraudulently, and the burden of proof rests upon him who seeks to impeach a conveyance for fraud.⁹⁴ And, as a further rule, it may be said that the fraud which will prevent a possession from becoming the foundation of an adverse title means actual fraud—a moral fraud or wrongful act—and not technical or legal fraud.⁹⁵

§ 424. **Entry under void deed.**—While it is often asserted that an adverse occupant claiming under color of title must enter and hold the land in good faith, believing his conveyance to be valid, in order to initiate an adverse possession, particularly in those states where such occupant must found his claim upon a "written instrument" purporting to be a conveyance of the property in question, yet much latitude is allowed with respect to the character of such "written instrument." Thus, notwithstanding the deed is void for irregularity appearing upon its face,⁹⁶ yet if it contains a proper description of the land, and the grantee enters into possession under it, claiming title, and continues to hold and enjoy the land, the fact of invalidity becomes immaterial where there has been an actual undisturbed occupation for the statutory

⁹¹ *Smith v. Ferguson*, 91 Ill. 304.

⁹² *Coleman v. Billings*, 89 Ill. 183; *Stubblefield v. Borders*, 92 Ill. 279; *Coward v. Coward*, 148 Ill. 268; *Lee v. Ogden*, 83 Ga. 325.

⁹³ *Smith v. Ferguson*, 91 Ill. 304; *Ware v. Barlow*, 81 Ga. 1.

⁹⁴ *O'Neal v. Boone*, 82 Ill. 589.

⁹⁵ Such as a sale by two only out of three trustees who should have joined therein. *Ware v. Barlow*, 81 Ga. 1.

⁹⁶ *Watson v. Mancill*, 76 Ala. 600; *Gatling v. Lane*, 17 Neb. 77; *Randolph v. Casey*, 43 W. Va. 289.

period of limitation.⁹⁷ So, too, notwithstanding the grantee may not have purchased in good faith, yet, if his deed has not been attacked on the ground of voidability during the time allowed by law, the question of good faith cannot be inquired into.⁹⁸ And even where a party founding his claim upon an instrument which he knew or had reason to believe was void may be denied character as an occupant in good faith, yet this knowledge must be positive, and not such as would arise from the legal construction of the instrument.⁹⁹

On the other hand, in some states the element of good faith is wholly immaterial, and possession with claim of title for the requisite period, under an instrument absolutely void upon its face, will confer title by adverse possession.¹

The generally received doctrine is as last above stated but there are also numerous decisions which either qualify or deny the rule. There should be no difference, in effect, between a deed void for some defect or irregularity and one regular in form but void because of incapacity in the grantor, and, generally, in those states where the doctrine of colorable title is permitted to obtain, a possession taken under an instrument of conveyance and continued for the statutory period will perfect an adverse title, no matter how defective the title of the grantor in such instrument.² Still, even where the general doctrine is recognized, it has been held that a deed by or to a person absolutely without capacity cannot be made the basis of a colorable title.³

⁹⁷ *Wilson v. Atkinson*, 77 Cal. 485, 11 Am. St. 299; *McMillan v. Wehle*, 55 Wis. 685; *Bennett v. Land & I. Co.*, 23 Colo. 470; *Bartlett v. Ambrose*, 78 Fed. Rep. 839; *Twohig v. Leamer*, 48 Neb. 247; *Randolph v. Casey*, 43 W. Va. 289, 27 S. E. Rep. 231; *McNeill v. Fuller*, 121 N. C. 209.

⁹⁸ *Morrill v. Manufacturing Co.*, 60 Minn. 405.

⁹⁹ *Wilson v. Atkinson*, 77 Cal. 485; *Sexson v. Barker*, 172 Ill. 361; *Dubuque v. Coman*, 64 Conn. 475.

¹ *La Crosse v. Cameron*, 80

Fed. Rep. 264; *Bernstein v. Humes*, 75 Ala. 241; *Reilly v. Blaser*, 61 Mich. 399.

² See *Ryan v. Kilpatrick*, 66 Ala. 332; *Peck v. Lockridge*, 97 Mo. 549.

³ See *Pittsburg, etc. R. R. Co. v. Reich*, 101 Ill. 157; *Saunders v. Silvey*, 55 Tex. 46; *Childress v. Calloway*, 76 Ala. 128. In this case a tax deed was made to one who was neither the purchaser nor assignee of the certificate, to whom alone such a deed could be made. But see *Dubuque v. Coman*, 64 Conn.

§ 425. **Constructive possession.**—Where title is asserted adversely under a claim of right and with color of title, accompanied by occupancy, it is a rule of general observance that the extent of the claim must be measured by the instrument under which the entry is made.⁴ Hence, where such instrument purports to convey an entire tract, notwithstanding actual occupation is had only of a portion of the premises, the claimant will nevertheless be considered as constructively in possession of all of the land described in his deed or other muniment of title, his occupancy of part being, in contemplation of law, the occupancy of every portion.⁵

On the other hand, if there is no color of title, that is, no instrument under which the entry purports to have been made, the occupant will be limited to that part of the tract actually brought under his control and over which he is exercising acts of ownership. He cannot extend his possession constructively so as to cover a larger portion.⁶

An interesting question is presented where two holders of hostile titles to the same tract are each in the occupation of a small portion within the exterior boundaries. In such event the doctrine of constructive possession becomes very efficient to settle the question of title. It has been held, in a case similar to that last mentioned, that constructive possession follows the true or elder title, and that the statute of limitations will not run in favor of the invalid title, except as to the part in actual possession.⁷ In both instances there would undoubtedly be a constructive possession, but, as two persons cannot be in the exclusive possession of the same thing at the

475, where a deed executed by a successor of a trustee was held to confer color of title upon the grantee, although the power of sale was personal to the original trustee and did not pass to such successor.

⁴ Washburn v. Cutter, 17 Minn. 361; Ruffin v. Overby, 105 N. C. 78.

⁵ Hodges v. Eddy, 38 Vt. 327; Welborn v. Anderson, 37 Miss. 155; Brooks v. Bruyn, 18 Ill.

539; Crispen v. Hannavan, 50 Mo. 536; Woods v. Hull, 90 Tex. 228.

⁶ Roots v. Beck, 109 Ind. 472; Harms v. Kransz, 167 Ill. 421, 47 N. E. Rep. 746; Anderson v. Dodd, 65 Ga. 402; Porter v. Miller, 76 Tex. 593; Doyle v. Wade, 23 Fla. 90, 1 So. Rep. 516; Nicklase v. Dickerson, 65 Ark. 422, 46 S. W. Rep. 945.

⁷ Semple v. Cook, 50 Cal. 36; Woods v. Hull, 90 Tex. 228.

same time, the solution of the question is reached by allowing the constructive possession of the true or elder owner to overcome the constructive possession of the intruder.

§ 426. **Mixed possession.**—The concluding portion of the last paragraph suggests a further discussion of mixed possession. An embarrassing question is presented where two persons are in the actual occupancy of land and exercising dominion over it under a claim of title. Such a case might be presented where two persons occupy the same house, each claiming an exclusive right; or where two persons are each in the actual occupancy of parts of an entire tract, claiming ownership in the whole. The early cases do not experience much difficulty in deciding a matter of this kind, for where two persons are in possession of land, the one by title and the other by wrong, the possession is awarded to him who has the title.⁸ The theory upon which the courts proceeded was, that although there might be a concurrent possession there could not be a concurrent seizin of lands, and that only one being seized the possession must be adjudged to be in him because he has the right.⁹ This reasoning seems sound and logical and the rule announced has been generally followed in later decisions.¹⁰ Of course, an adverse holder may originate and perfect a title to specific part of land under a claim of the whole, but in such case there must be an actual occupation of the part which amounts to a disseizin of the legal owner. There can be no constructive possession as against the legal title.¹¹

The question does not seem to be of frequent occurrence, but where it has been presented the courts have usually held that a claim of adverse possession, where such possession has not been exclusive, is without merit.¹² Where there is an ac-

⁸ *Codman v. Winslow*, 10 Mass. 151; *Mather v. Trinity Church*, 3 Serg. & R. (Pa.) 509; *Smith v. Burtis*, 6 Johns. (N. Y.) 218; *Deputron v. Young*, 134 U. S. 241.

⁹ *Langdon v. Potter*, 3 Mass. 219.

¹⁰ *Sample v. Cook*, 50 Cal. 26;

Lowell v. Stevens, 2 McCrary (C. Ct.) 311; *Deputron v. Young*, 134 U. S. 241.

¹¹ *Deputron v. Young*, 134 U. S. 241; *Anderson v. Jackson*, 69 Tex. 346.

¹² *Smith v. Young*, 89 Iowa, 338; *Scruggs v. Land Co.*, 86 Ala. 173.

tual exclusive possession of a part, under a claim of the whole, then, as to such part, there may be a sufficient showing to establish a title. But this is as far as the principle can be extended, and where the respective possessions are so intermixed that they cannot be separated neither can be regarded as an ouster of the other.¹³

§ 427. **Tacking.**—To bar the right of entry by the true owner, by an adverse possession, it is immaterial whether the possession has been held by one or by a succession of individuals, provided such possession has been connected and continuous.¹⁴ Such continuity and connection, technically known as *tacking*, may be effected by any conveyance or understanding that has for its object a transfer of the rights of the possessor, when accompanied by an actual transfer of possession,¹⁵ or, it may be accomplished by operation of law where the necessary privity exists between the successive adverse claimants.¹⁶ Such privity may arise between two holders where a later takes under an earlier by descent, or by a will, or deed, but a paper evidence is not necessary to show the relation as the authorities are all agreed that a parol bargain and sale, followed by delivery of the possession of the property, will be equally as operative for the purpose of tacking as a formal deed of conveyance from one occupant to another.¹⁷

¹³ As where two persons are in the occupation of a building, the one in the lower story and the other in the upper story, and each claims ownership of the lot on which the building stands. There being no exclusive possession of the entire property, a claim of title by adverse possession will not be sustained. *Truth Lodge v. Barton*, 119 Iowa, 230, 93 N. W. Rep. 106.

¹⁴ *Turner v. Hart*, 71 Mich. 128; *Louisville, etc. R. R. Co. v. Philyaw*, 88 Ala. 264; *Haynes v. Boardman*, 119 Mass. 414; *Alexander v. Stewart*, 50 Vt. 87; *McNeeley v. Langan*, 22 Ohio St. 37; *Verdery v. Railway Co.*, 82

Ga. 675; *Brown v. Brown*, 106 N. C. 451; *Ramsey v. Glenny*, 45 Minn. 401; *Wishart v. McKnight*, 178 Mass. 356, 86 Am. St. 486, 59 N. E. Rep. 1028.

¹⁵ *Vandall v. St. Martin*, 42 Minn. 163; *Wishart v. McKnight*, 178 Mass. 356; *Kendrick v. Latham*, 25 Fla. 819.

¹⁶ *Ross v. Goodwin*, 88 Ala. 390; *Kruse v. Wilson*, 79 Ill. 233; *Duren v. Kee*, 26 S. C. 219; *McLemore v. Durivage*, 92 Tenn. 482.

¹⁷ *Weber v. Anderson*, 73 Ill. 439; *Day v. Wilder*, 47 Vt. 584; *Illinois Steel Co. v. Budzisz*, 106 Wis. 499.

Thus, the possession of an heir may be tacked to that of his ancestor;¹⁸ of a receiver to that of the debtor;¹⁹ of an assignee to that of his assignor,²⁰ and, generally, the last of several successive adverse claimants may tack the possession of his predecessors to his own, so as to make a continuous holding for the statutory period.²¹

The element of connected continuity must, however, affirmatively appear and in such a manner as to show conclusively that the possession of the true owner has not, even constructively, intervened,²² and several successive but unconnected disseizins or adverse holdings, though amounting in the aggregate to twenty years, or such other period as the statute may limit for an entry on land, cannot be tacked together to make the necessary continuous possession.²³

Where an adverse possession has been duly originated the party so claiming adversely, or his successor in interest, may continue such possession by his tenant, and the absence of the landlord from the state will not interrupt the running of the statute of limitations, as the true owner has his right of action against the tenant to recover possession.²⁴

Where different possessions are thus sought to be tacked together it is essential that each shall have been properly commenced and continued and the same rules will apply to the different occupants as would in the case of a single occupant for the entire period. Thus, a possession during the lifetime of a life tenant cannot be joined to a possession after his death

¹⁸ *Teabout v. Daniels*, 38 Iowa, 158; *Duren v. Kee*, 26 S. C. 219; *Ramsey v. Glenny*, 45 Minn. 401; *McLemore v. Durivage*, 92 Tenn. 482.

¹⁹ *Verdery v. Railway Co.*, 82 Ga. 675.

²⁰ *Brown v. Brown*, 106 N. C. 451.

²¹ *Kendrick v. Latham*, 25 Fla. 819; *Louisville, etc. Ry. Co. v. Philyaw*, 88 Ala. 264.

²² *Ramsey v. Glenny*, 45 Minn. 401; *Ross v. Goodwin*, 88 Ala. 390; *Warren v. Fredericks*, 76 Tex. 647, 13 S. W. Rep. 643.

²³ *Marsh v. Griffin*, 53 Ga. 320; *Pegues v. Warley*, 14 S. C. 180; *Turner v. Hart*, 71 Mich. 128; *Ross v. Goodwin*, 88 Ala. 390; *Ramsey v. Glenny*, 45 Minn. 401. But see *Smith v. Chapin*, 31 Conn. 530; *Davis v. McArthur*, 78 N. C. 357, where an apparently contrary rule is asserted.

²⁴ *Ramsey v. Glenny*, 45 Minn. 401. And see *Omaha, etc. Trust Co. v. Parker*, 33 Neb. 775; *Thomas v. Burnett*, 128 Ill. 37; *McLean v. Smith*, 106 N. C. 172.

to complete a title against the remainderman or owner of the fee.²⁵

§ 428. **Continued—Conflicting theories.**—The statements of the preceding paragraph represent not only the generally received rules with respect to tacking but also the theory upon which such rules are based. That is, a continuity of possession arising from some privity between the successive occupants. It would seem, however, that in England, as well as in some of the American states, the exclusion of the true owner for the statutory period is the pivot upon which the question is made to turn, and the test by which it is determined. It is there held that one who seeks to avail himself of the statute of limitations by proving the possession of successive occupants is not like one who endeavors to establish an easement by showing that a succession of persons had prescribed it; that there is a distinction between prescriptive user and the limitation of the statute, and that, when the latter is relied upon, the only question is, whether the demandant has been continuously kept out of possession for the legal period, not whether the persons who kept him out of possession held one under the other.²⁶

§ 429. **Adverse possession by one of several occupants.**—While the possession required by the statute to originate and perfect an adverse right must be actual, visible, exclusive and hostile, there may yet be occasions where these ingredients may exist notwithstanding the occupancy of the land is shared with others. This will often be the case where an adverse title is claimed by a married woman. Ordinarily a married woman will be presumed to have entered under her husband and a recovery against him will be effective against her. But if she entered in her own right, and under a color of title emanating from some source other than her husband, and continued in possession for the statutory period of limitation,

²⁵ *Gindrat v. Railway Co.*, 96 Ala. 162.

²⁶ This seems to be the doctrine of the English cases and has been affirmed in the following: *McNeely v. Langan*, 22

Ohio St. 32; *Scheetz v. Fitzwater*, 5 Pa. St. 126; *Shannon v. Kinny*, 1 A. K. Marsh. (Ky.) 3. And see *Chapin v. Freeland*, 142 Mass. 383.

a title will vest in her by adverse possession, and the jury must determine as to the sufficiency of the evidence required to overcome the presumption arising from the joint occupancy of herself and husband.²⁷ So, too, where a husband makes a deed to his wife, with the intention of vesting title in her and of releasing his marital rights in the land, the wife's possession becomes adverse to him, notwithstanding he continues to jointly occupy the land with her.²⁸

As a general rule, however, the elements of hostility and exclusive claim must exist to render a possession adverse to a joint occupant, and there must be acts which serve to impart notice of the claim as in other cases. The mere payment of taxes and the making of improvements by one of several joint occupants of land, where his possession has not been open, notorious, and hostile to the other occupants, is not evidence of an actual ouster or of an adverse holding, and in themselves will not set in operation the statute of limitations.²⁹

§ 430. *Nature of occupancy.*—As previously stated the circumstances of the particular case constitute the pivot on which the question of a disseizin must turn, and while both statutory enactments and judicial decisions place much stress on actual occupation, yet the general consensus of opinion seems to be that it is only such actual occupation as the land is adapted to and such as is reasonably sufficient to attract the attention of the true owner and put him on inquiry as to the nature and extent of the apparent invasion of his rights.³⁰ One of the most significant forms of occupation is an inclosure and this, when of a substantial character, is generally held to be one of the best and most decisive indications of hostile claim.³¹ But, an inclosure having no purpose of physical ex-

²⁷ *Collins v. Lynch*, 157 Pa. St. 246.

²⁸ *McQueen v. Fletcher*, 77 Ga. 444.

²⁹ *Pierson v. Conley*, 95 Mich. 619.

³⁰ *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 85 N. W. Rep. 402, 83 Am. St. 905; *Woods v. Montevallo*, etc. Co., 84 Ala. 560;

Blanchard v. Moulton, 63 Me. 434; *Murphy v. Doyle*, 37 Minn. 113; *French v. Goodman*, 167 Ill. 345.

³¹ *Tallaferro v. Butler*, 77 Tex. 578; *Barnes v. Light*, 116 N. Y. 34; *Tourtellotte v. Pearce*, 27 Neb. 57; *Miller v. Cramer*, 48 S. C. 282.

clusion of outside interferences,—a mere furrow turned with a plow around the land,³² or a line marked by cutting away the brush,³³ has been held insufficient to indicate the boundaries of an adverse claim.³⁴ Where land is claimed under color of title, however, it is not essential that the party must have the land inclosed before he can be said to be in its actual possession. Such possession may be shown by the constant and uninterrupted use of the land, through a series of years, for such purposes as it may be adapted. Thus, if it is timber land, by taking wood therefrom for fuel, fences, or other purposes. In such cases the deed, or other matter constituting the "color", may be regarded as bringing under possession all the land which it includes.³⁵

In like manner the statutes speak of improvements, yet it would seem that no particular kind of improvement is required, so long as it satisfies what is usual under the circumstances.³⁶ It is not necessary that it should add anything to the value of the land, and practically means nothing more than use.³⁷ Any actual visible use to which similar property is usually devoted may be sufficient, and it is wholly immaterial whether the result be to increase or decrease the value.³⁸

At common law to constitute an adverse possession there is no need for a fence, or building, or any other improvement, the

³² *Sage v. Morosick*, 69 Minn. 167, 71 N. W. Rep. 930; *Nicholson v. Aronson*, 58 Kan. 814.

³³ *Worthley v. Burbanks*, 146 Ind. 534, 45 N. E. Rep. 779.

³⁴ See *O'Hara v. Richardson*, 46 Pa. St. 285; *Hutton v. Schumaker*, 21 Cal. 453; *Sauers v. Giddings*, 90 Mich. 50. It has been held, however, that in the case of prairie lands, in a vicinity where such lands are not usually fenced, to constitute open, notorious and exclusive possession, it is sufficient that the occupant entered under a claim of ownership, erected buildings, and defined the boundaries of his claim by plowing furrows around the land, according to the custom of

the neighborhood, and that afterward he remained in possession of the lands so enclosed. *Sage v. Morosick*, 69 Minn. 167, 71 N. W. Rep. 930.

³⁵ *Austin v. Rust*, 73 Ill. 491; *Porter v. Miller*, 76 Tex. 593; *Springs v. Schenck*, 106 N. C. 153; *Wilson v. Atkinson*, 77 Cal. 485. But see *Morris v. McClary*, 43 Minn. 346.

³⁶ *Illinois Steel Co. v. Billet*, 109 Wis. 418, 85 N. W. Rep. 402, 83 Am. St. 905; *Holtzman v. Douglas*, 168 U. S. 278; *Hubbard v. Kiddo*, 89 Ill. 578.

³⁷ *Archibald v. Railroad Co.*, 157 N. Y. 576, 52 N. E. Rep. 569.

³⁸ *Illinois Steel Co. v. Billet*, 109 Wis. 418.

visible and notorious acts of the occupant being sufficient when exercised for the statutory period.³⁹ And where acts of ownership have been done upon the land, which from their nature indicate a notorious claim of property in it, such acts are evidence of an ouster of the former owner and an actual adverse possession.⁴⁰ The nature and situation of the property and the uses to which it can be applied are the tests by which occupation and acts of ownership are to be tried, and it has been held that neither actual occupation, cultivation, nor residence are necessary where the property is so situated as not to admit of any permanent or useful improvements.⁴¹ In such a case, if the continued claim of the adverse party has been evidenced by public acts of ownership such as he could or would exercise over property which he claimed in his own right and would not exercise over property which he did not claim, this, it seems, will be sufficient.⁴²

The foregoing doctrine has been announced and approved in states where statutes are in force providing for "actual occupation", "improvements", and the like, the courts, in such cases, construing these terms in their broad sense of any use for which the lands are adapted.

But mere acts of trespass, as the occasional cutting of timber,⁴³ or pasturing of cattle,⁴⁴ or cutting of grass,⁴⁵ or other acts of a like character, while they may tend to show ownership, will not constitute adverse possession.⁴⁶ As before

³⁹ *Cooper v. Morris*, 48 N. J. L. 607.

⁴⁰ *Dice v. Brown*, 98 Iowa, 297; *Goodson v. Brothers*, 111 Ala. 589.

⁴¹ *Ewing v. Burnet*, 11 Pet. (U. S.) 52; *Sadtler v. Peabody Heights Co.*, 66 Md. 1; *Ford v. Wilson*, 35 Miss. 490; *Cooper v. Morris*, 48 N. J. L. 607.

⁴² See *Clement v. Perry*, 34 Iowa, 564; *Curtis v. Campbell*, 54 Mich. 340; *Hughes v. Anderson*, 79 Ala. 209; *Richards v. Smith*, 67 Tex. 610; *Sheldon v. Mull*, 67 Cal. 299; *Merrill v. Tobin*, 30 Fed. Rep. 738; *Swan*

v. Munch, 65 Minn. 500; *Holtzman v. Douglas*, 168 U. S. 278.

⁴³ *Harms v. Kransz*, 167 Ill. 421.

⁴⁴ *Bergere v. United States*, 168 U. S. 66; *Hicks v. Tederick*, 9 Lea (Tenn.), 491.

⁴⁵ *McCloskey v. Hayden*, 169 Ill. 297; *Roberts v. Baumgarten*, 51 N. Y. S. C. 482.

⁴⁶ See *Carter v. Hornback*, 139 Mo. 238; *Nicholson v. Aronson*, 58 Kan. 814; *Wilson v. Blake*, 53 Vt. 305; *Austin v. Rust*, 73 Ill. 491; *Ruffin v. Overby*, 105 N. C. 78; *Aiken v. Ela*, 62 N. H. 400.

shown, however, where a claim is asserted by a written instrument—under color of title—these occasional acts are accorded a deeper significance and are always admissible in evidence to support a plea of the statute of limitations.⁴⁷

§ 431. *Occupation under license.*—It is fundamental that a possession of land, to be adverse, must be taken and held under a claim of right, or, as it is sometimes expressed, with an intention to appropriate and hold as owner, and, as a rule, there can be no adverse possession without an intention to claim title.⁴⁸ Hence, possession under a license is not adverse,⁴⁹ and will be unavailing under the statute of limitations. This rule has been held to apply where one continues to hold land which he entered under a license, after such land has been conveyed to another, though without the knowledge of the licensee, and such occupant, as against the grantee, will not be permitted to acquire an adverse title.⁵⁰ The decisions in such cases proceed upon the theory that if a party claims only a limited interest and not a fee the law will not, contrary to his intentions, enlarge it to a fee.⁵¹ The general rule, to be collected from all of the decisions, is, that a permissive occupancy of another's land is not hostile, and, however long continued, must be deemed to be in subordination to the title of the true owner, whose entry will never be barred thereby.⁵² And, generally, a mere occupancy of land although exclusive and without payment of rent, if unaccompanied by any claim of title or dispute of the title of the owner, will not be sufficient to constitute an adverse possession.⁵³ These rules apply generally to all licensees, whatever may be their special character, and

⁴⁷ *Forey v. Bigelow*, 56 Iowa, 381; *Scott v. Delany*, 87 Ill. 146; *Coleman v. Billings*, 89 Ill. 183.

⁴⁸ *Hagan v. Ellis*, 39 Fla. 463, 63 Am. St. 167, 22 So. Rep. 727; *Bond v. O'Gara*, 177 Mass. 139, 58 N. E. Rep. 275, 83 Am. St. 265.

⁴⁹ *Handlan v. McManus*, 100 Mo. 124, 13 S. W. Rep. 207, 18 Am. St. 533; *Bond v. O'Gara*, 177 Mass. 139, 58 N. E. Rep. 275, 83 Am. St. 265; *Anderson v. McCormick*, 18 Oreg. 301.

⁵⁰ *Bond v. O'Gara*, 177 Mass. 139, 58 N. E. Rep. 275, 83 Am. St. 265.

⁵¹ See *Ricard v. Williams*, 7 Wheat. (U. S.) 107.

⁵² *Anderson v. McCormick*, 18 Oreg. 301, 22 Pac. Rep. 1062; *McDonald v. Fox*, 20 Nev. 364; *Ward v. Edge*, 100 Ky. 757.

⁵³ *Maple v. Stevenson*, 122 Ind. 368.

are often invoked in the case of tenants or prospective purchasers who have been let into possession. As to all such the rule is fundamental that their possession is not adverse as against the person under whom they entered, and that it cannot become so until there has been a surrender or a notice that they no longer hold in subordination to the title under which they entered.⁵⁴ In every such case, where it is shown that possession at a certain time was held in subordination to the title of another it will be presumed to so continue, and it cannot afterward become adverse as against the latter without proof that it was held in hostility to such other's title; that the possessor repudiated the permissive or subordinate character of the possession as it previously existed, and that the full period of limitation has expired since such repudiation.⁵⁵

§ 432. **Payment of taxes.**—The payment of taxes on land is not an act of possession, neither is it, of itself, evidence of possession or a possessory title.⁵⁶ Yet, as acts of this character are usually exercised only by persons who have some direct interest in the property, they tend to show a claim of ownership,⁵⁷ and, taken in connection with other circumstances evidencing an actual possession, may also serve to show the extent of the possession claimed.⁵⁸ Tax receipts, therefore, showing such payments, are properly admissible in evidence when offered in support of actual possession,⁵⁹ and where it is shown that a person has for more than twenty years listed land for taxation, and paid the taxes thereon, being part of the time in actual possession, continually and uninterruptedly exercising acts of ownership, and refusing to extend like privileges

⁵⁴ See *Brunson v. Morgan*, 84 Ala. 598; *Udell v. Peak*, 70 Tex. 547; *Bedlow v. Dry Dock Co.*, 112 N. Y. 263; *Alderson v. Marshall*, 7 Mont. 288, 16 Pac. Rep. 576.

⁵⁵ *Trufant v. Hudson*, 99 Ala. 526.

⁵⁶ *Scott v. Mills*, 49 Ark. 266; *Garrett v. Land Co.*, 94 Tenn. 459; *Tillotson v. Prichard*, 60 Vt. 94; *Draper v. Shoot*, 25 Mo. 197;

Raymond v. Morrison, 59 Iowa, 371; *Malloy v. Bruden*, 86 N. C. 251.

⁵⁷ *Paine v. Hutchins*, 49 Vt. 314; *Brown v. Rose*, 48 Iowa, 231; *Sadtler v. Peabody Heights Co.*, 66 Md. 1; *Farrar v. Fessenden*, 39 N. H. 268; *Wren v. Parker*, 57 Conn. 529.

⁵⁸ *Green v. Jordan*, 83 Ala. 220.

⁵⁹ *Baucum v. George*, 65 Ala. 259.

to others, this is competent to establish adverse possession.⁶⁰ Possession, of some kind, is essential in all cases of this character, and unless this fact affirmatively appears the claim must fail.⁶¹

The payment of taxes may, however, become an important circumstance depending on local statutory policy with respect to shortened periods of limitation. In many of the states it is now provided that where a person in the actual possession of lands, under color of title, shall for a specific period pay all taxes legally levied thereon, such person will be permitted to assert an ownership to the extent, and according to the purport of, his paper title. But, to maintain the bar of the statute, a strict compliance with its terms is essential, and the claimant must show not only a claim and color of title but also a continuous possession thereunder during the prescribed period and the payment of all taxes imposed upon the land during that time.⁶² It is not essential that the taxes shall be paid within or during the year in which they accrue, but they must be paid within the prescriptive period,⁶³ and by the person asserting the claim.⁶⁴ Hence, it is essential that a party relying upon the limitation of the statute and payment of taxes should affirmatively show that *he* paid the taxes for the requisite number of years, as the law will raise no presumptions in his favor nor can he claim the benefit of the official records which simply show the fact of payment but not the person by whom the payment was made.⁶⁵

Ordinarily the production of a properly authenticated tax receipt is the best evidence of the payment of a tax. The statute, however, does not, as a rule, provide any specific mode of

⁶⁰ *Rogers v. Miller*, 13 Wash. 82.

⁶¹ Adverse possession of town lots susceptible of enclosure cannot be based upon mere payment of taxes upon land, including the lots, where they have not been enclosed. *Garrett v. Land Co.*, 94 Tenn. 459.

⁶² *Wettig v. Bowman*, 47 Ill. 17; *Power v. Kitching*, 10 N.

Dak. 254; *Reynolds v. Willard*, 80 Cal. 605.

⁶³ *Irwin v. Miller*, 23 Ill. 401; *Coffield v. Furry*, 19 Ill. 183; *Beaver v. Taylor*, 68 U. S. 637; *Snowden v. Rush*, 76 Tex. 137, 13 S. W. Rep. 189.

⁶⁴ *Hardin v. Gouveneur*, 69 Ill. 140.

⁶⁵ *Irwin v. Miller*, 23 Ill. 348.

proving such payment, and as the payment of money or discharge of a debt may usually be shown by oral testimony, notwithstanding that a receipt was taken, so, it is believed, the fact of payment of taxes may be established by any method of legitimate proof.⁶⁶

Where this shortened period of limitation is permitted the fact of possession is usually a material circumstance, and the mere payment of taxes and assertion of exclusive right to lands do not, of themselves, constitute possession or dispossess the holder of the true title. Nor will fitful acts of ownership, not of such notoriety as to put the real owner on guard or furnish notice, be sufficient to evidence a continuous disseizin or establish title by adverse possession.⁶⁷ But where the full statutory period has run, and the adverse claimant has complied with all of the statutory requirements, his title will become complete, and the owner of the record title cannot defeat the same by paying the taxes for the last year of such period, after they have been paid by the adverse claimant, although within the time allowed by law for the payment of taxes.⁶⁸

§ 433. **Declarations and admissions.**—The adverse character of a possession is ordinarily, if not always, shown by the facts of the case, and is not derived from the statements and declarations of the party in possession. Except when constituting a part of the *res gestæ* the declarations of a party cannot be admitted in his own favor, and it follows that the mere absence of such declarations cannot be shown against him. The absence of such declarations has no tendency to prove that the possession is not adverse, for a party is not bound to make public proclamations that he holds adversely.⁶⁹

⁶⁶ *Hinchman v. Whetstone*, 23 Ill. 108. In this case it was said: "The requirement of the statute would be as fully answered without as with a receipt. It forms no part of the payment, but is only evidence of the fact. No reason is perceived why the payment of taxes may not be proved by the verbal evidence of a wit-

ness, as well as the payment of money in any other case.

⁶⁷ *Brown v. Bocquin*, 57 Ark. 97; *Wright v. Stice*, 173 Ill. 571.

⁶⁸ *Osburn v. Searles*, 156 Ill. 88.

⁶⁹ *Florence v. White*, 50 Neb. 516, 70 N. W. Rep. 50; *Barnes v. Light*, 116 N. Y. 34.

Therefore, whatever he says or omits to say is a matter of no importance, unless he speaks against his own interest, or fails to speak when it is his duty so to do.⁷⁰ Claim of title by word of mouth is never necessary to adverse possession where land is entered upon, actually occupied, and improved.⁷¹

But should the occupant speak against his own interest, as if he admits a superior title in his opponent,⁷² or having entered without knowledge as to who owned the land he afterward made inquiries for the purpose of buying it,⁷³ these circumstances might be shown against him to defeat his claim. But where a person has held under all the conditions necessary to confer title by adverse possession, the mere fact that before the expiration of the statutory limitation he had expressed doubts as to his title,⁷⁴ will not be sufficient to prevent his holding the land.⁷⁵ So, too, after title has been thus acquired an offer by the adverse possessor to the holder of the paper title to buy whatever rights the latter has, particularly if such offer is made to avoid a lawsuit, is not an admission of superior title that will invalidate the title acquired by adverse possession.⁷⁶

The rule which permits declarations against interest to be shown against the party making them applies as well to statements in disparagement of title by those under whom a party claims. Thus, statements by the grantor while in possession under a claim of right are admissible in evidence in favor of one claiming adversely to his grantee.⁷⁷ In like manner the admissions of an ancestor, which could affect him were he a party, are receivable in evidence against his heirs,⁷⁸ and, generally, declarations of a deceased person are admissible against

⁷⁰ *Seymour v. School District*, 53 Conn. 502.

⁷¹ *Barnes v. Light*, 116 N. Y. 34, 22 N. E. Rep. 441.

⁷² *New Orleans v. Shakspear*, 39 La. Ann. 1033, 3 So. Rep. 346.

⁷³ *Mhoon v. Cain*, 77 Tex. 316, 14 S. W. Rep. 24.

⁷⁴ *Oldig v. Fisk*, 53 Neb. 156.

⁷⁵ *Hoffman v. White*, 90 Ala. 354.

⁷⁶ *Furlong v. Cooney*, 72 Cal.

322; *Oldig v. Fisk*, 53 Neb. 156; *Chapin v. Hunt*, 40 Mich. 595; *Illinois, etc. Ry. Co. v. Wakefield*, 173 Ill. 564; *Bruce v. Washington*, 80 Tex. 368.

⁷⁷ *Royal v. Chandler*, 79 Me. 265.

⁷⁸ *Terry v. Rodahan*, 79 Ga. 278; *Burnett v. Harrington*, 70 entered under a claim of owner Tex. 213.

those who claim in the interest or right of such decedent.⁷⁹ The rule is equally well settled, however, that acts and declarations of a grantor subsequent to his deed cannot be received in evidence to invalidate it,⁸⁰ or to defeat the title of his grantee.⁸¹

§ 434. *Interruption.*—As previously shown, the element of peaceful continuity is an essential ingredient of every adverse possession, and any substantial interruption thereof, before the statutory limit has expired, restores the seizin of the rightful owner of the land.⁸² In such event a new entry and disseizin will be necessary in order to set the statute again in motion and to create the statutory bar.⁸³ An adverse possession is not interrupted, however, by the unknown intrusion of strangers,⁸⁴ unless continued for such length of time as to become an assertion of right,⁸⁵ and if such intrusions are known and not submitted to, or acquiesced in, but are forthwith remedied, by legal process or otherwise, they will not amount to an interruption of the continuity of possession.⁸⁶ Neither will a temporary destruction of a part of the premises, whether by flood or fire, if followed by repairs within a reasonable time, interrupt the running of the statute.⁸⁷ Nor is it essential that occupation should be constant to make it sufficiently continuous to be adverse when the property is used from time to time as needed.⁸⁸ Whether an actual possession has been continuous, is, in general, a question of fact for the jury.⁸⁹

⁷⁹ *Bank v. Albee*, 64 Vt. 571; *McLeod v. Swain*, 87 Ga. 156.

⁸⁰ *Dudley v. Hurst*, 67 Md. 44; *Galland v. Jackman*, 26 Cal. 79.

⁸¹ *Williams v. Eikenberry*, 25 Neb. 721; *Baker v. Haskell*, 47 N. H. 479; *Beville v. Jones*, 74 Tex. 148.

⁸² *Stewart v. Stewart*, 83 Wis. 364; *Brown v. Hanauer*, 48 Ark. 277; *Harms v. Kransz*, 167 Ill. 421; *Johnston v. Fitz George*, 50 N. J. L. 470.

⁸³ *Parkersburg v. Schultz*, 43 Va. 470; *Malloy v. Bruden*, 86 N. C. 251.

⁸⁴ *Baeder v. Jennings*, 40 Fed. Rep. 199.

⁸⁵ *Bell v. Denson*, 56 Ala. 449. And see *Cervena v. Thurston*, 59 Neb. 343; *Sherman v. Kane*, 86 N. Y. 57.

⁸⁶ *Normant v. Eureka Company*, 98 Ala. 181; *Noyes v. Hefernan*, 153 Ill. 339.

⁸⁷ *Baldwin v. Durfee*, 116 Cal. 625, 48 Pac. Rep. 724.

⁸⁸ *Swan v. Munch*, 65 Minn. 500.

⁸⁹ *Thompson v. Kauffelt*, 110 Pa. St. 209.

It is not necessary in order to constitute an interruption, that there should be an actual ouster of the adverse holder. The running of the statute may be arrested if from any reason the possession ceases to be adverse, notwithstanding possession in fact continues. Thus, after a valid sale under execution and a conveyance by the sheriff, the continued possession of the land by the defendant in execution is not adverse, but in subordination to the rights of the purchaser at the sale.⁹⁰ So, too, when after the rendition of a judgment against a party in possession of land declaring the deed under which he holds to be void, such party continues in possession, but without claiming to hold adversely except by virtue of such deed, his possession is not adverse.⁹¹ And, generally, any recognition by the occupant of the owner's title will break the continuity of adverse possession.⁹²

§ 435. **Entry by owner.**—If at any time, before the full period of limitation has elapsed, the owner shall enter and regain possession the continuity of the adverse possession will be broken,⁹³ and even though it may be retaken thereafter this will be regarded as a new possession, and the time previous to the interruption cannot be counted as part of the twenty years, or such other term as the statute may prescribe to fix the rights of the adverse holder. But to have this effect the entry must not be merely casual.⁹⁴ There must be an intent to enter and take possession under a claim of right,⁹⁵ and this intent would seem to be the important question in all cases of re-entry.⁹⁶

⁹⁰ *Haaa v. Delorme*, 30 Wis. 594.

⁹¹ *Stewart v. Stewart*, 83 Wis. 364.

⁹² *St. Paul v. Railway Co.*, 63 Minn. 330.

⁹³ *Johnston v. Fitz George*, 50 N. J. L. 470.

⁹⁴ Thus, an entry on land by a person disseized, merely for the purpose of seeing if there is any evidence of an adverse occupation, is not, as a matter of law, conclusive evidence of an interruption of the disseizor's adverse possession. *Bowen v. Guild*, 130

Mass. 121. Tearing down a division fence has been held not to break the continuity of the adverse possession of the adjacent owner. *Donovan v. Bissell*, 53 Mich. 462.

⁹⁵ *Johnston v. Fitz George*, 50 N. J. L. 470.

⁹⁶ *Brickett v. Spofford*, 14 Gray (Mass.), 514. An adverse possession is not interrupted by ejectment brought by the owner against the occupant, and afterwards dismissed. *Langford v. Poppe*, 56 Cal. 73. Nor by an offer to buy peace, litigation

It is not necessary, however, that the assertion of right, or the intent to claim and hold, should be evidenced by words or declarations. It is sufficient if the required purpose may be inferred from acts and circumstances, and what acts will indicate such an intent must be determined largely by the character of the land and the uses to which it may be put. That the intent is shown only by trivial acts, or that the possession acquired was retained only a short time, will not necessarily deprive an entry of the effect of interrupting adverse possession,⁹⁷ for it is not the length of the interruption but its quality which is to be considered in passing upon a question of this kind, and notwithstanding the evidence of the acts done may not conclusively show the required intent, yet, if it may justify an inference of the existence of such intent, it should be submitted to the jury.⁹⁸ As a general proposition, if the acts proved, considering the nature and situation of the land, indicate an assertion of right and an exercise of dominion and possession, then an interruption would take place and be effective, although possession was retained but for a brief period.

§ 436. **Effect of absence from state.**—A question arises where a title is claimed by adverse possession of one who during all or a portion of the limitation period has been absent from the state. This question is intensified where the statute requires an actual as distinguished from a constructive possession. But, as has been said, actual possession means nothing more than the property shall have been in the immediate control or under the power and dominion of the party who asserts adverse possessory rights therein,⁹⁹ and where an occupation has been taken of the land in controversy by an actual entry thereon, with an appropriate use thereof, according to its quality and condition, this will be sufficient to originate an adverse possession and set the statute in motion. When such occupation has thus been commenced it is immaterial that the occupant should himself, in his own person, continuously ex-

being threatened. *Tobey v. Se-*
cor, 60 Wis. 310.

⁹⁷ Consult *Stephenson v. Wil-*
son, 37 Wis. 482.

⁹⁸ *Bowen v. Guild*, 130 Mass.
121.

⁹⁹ *Omaha, etc. Trust Co. v.*
Parker, 33 Neb. 775, 29 Am. St.
506.

exercise possessory acts, and the occupation may be as effectively continued through his servants, agents or tenants.¹ The possession of the tenants or agents in such a case, is the possession of the person under whom they hold,² and, for all practical purposes, is the same as if by such person himself.³ Hence, it follows that the absence from the state of the adverse occupant in no way affects the right of the true owner to bring an action to recover possession of the land, and if he fails so to do within the time allowed by statute his action will be barred.⁴

§ 437. **Abandonment.**—A voluntary abandonment, with no intention of resuming possession, no matter how short, destroys the adverse possession and restores the seizin to the true owner.⁵ In such event the statute ceases to run and notwithstanding the adverse possessor may return and again occupy the land the subsequent entry is but a new disseizin, and the statute will begin to run only from the new entry.⁶

But while the general verity of the foregoing doctrine is unquestionable yet its practical application is frequently involved in much doubt, since intention, which forms its principal ingredient, must in most cases be deduced from circumstances. Inasmuch as adverse possession depends, to a great extent upon the nature of the land and the use to which it may be put and is only required to be of such a character as will inform those specially interested that the land is in the exclusive use and enjoyment of another than the true owner,⁷ it follows that much must be left to construction and, from the necessities of the case, that presumptions must often be permitted to exert the same force as actual and ascertained facts. Actual residence is not essential to continuous occupancy,⁸ provided there is a

¹ *Gartrell v. Stafford*, 12 Neb. 545; *Lindenmayer v. Gunst*, 70 Miss. 693.

² *McLean v. Smith*, 106 N. C. 172; *Lindenmayer v. Gunst*, 70 Miss. 693.

³ *Thomas v. Burnett*, 128 Ill. 37.

⁴ *Ramsey v. Glenny*, 45 Minn. 401; *Omaha, etc. Trust Co. v. Parker*, 33 Neb. 775; *Lindenmayer v. Gunst*, 70 Miss. 693.

⁵ *Doyle v. Wade*, 23 Fla. 90; *Crispen v. Hannavan*, 50 Mo. 536; *Louisville, etc. Ry. Co. v. Phillyaw*, 88 Ala. 264.

⁶ *Downing v. Mayes*, 153 Ill. 330.

⁷ *Kerr v. Hitt*, 75 Ill. 51.

⁸ *Coleman v. Billings*, 89 Ill. 183; *Clements v. Lampkin*, 34 Ark. 598; *Swan v. Munch*, 65 Minn. 500.

continuous dominion, manifested by continuous acts of ownership,⁹ and in many cases it has been held that mere occasional vacancies, such as occur in every case where a party who is unable to obtain a tenant shuts up his property for a short time,¹⁰ or even for a long time,¹¹ or where he leaves purely agricultural land unoccupied during the winter months,¹² or where he refrains from cultivating land for a season, or even for several years,¹³ will not be held to constitute an abandonment if sufficient reason therefor appears.¹⁴

§ 438. **Presumptions.**—It has been held, that possession of land, once established, by material acts of visible, notorious ownership, will be presumed to continue until open, notorious, adverse possession has been proved to have been taken by another.¹⁵ This doctrine while possibly effective for some purposes, is opposed in principle to the general rules governing the production of evidence in actions of ejectment and particularly with respect to adverse claims resting on possession and limitation. As a rule, no presumptions are raised to support a title of this character and the burden of proof is thrown upon him who asserts such title. Where, however, the defense of a prescriptive title is interposed by a defendant and the evidence shows that he was at one time in possession, holding adversely to the plaintiff, under a claim or color of title asserted in good faith, and that such possession continued down to the commencement of the action, such possession may, it seems, be presumed to have continued to be adverse in the absence of any evidence showing a change in its character.¹⁶

It has been held, that where it is once shown that land has been improved by being fenced, or by other lasting improve-

⁹ *Rayer v. Lee*, 20 Mich. 536; 536; *Downing v. Mayes*, 153 Ill. Crispen v. Hannavan, 50 Mo. 536. 330. But see *Scott v. Mills*, 49

¹⁰ *Thompson v. Kauffelt*, 110 Ark. 266.

¹¹ *See Swan v. Munch*, 65 Minn. 500; *Worthley v. Burbanks*, 146 Ind. 534.

¹² *Clements v. Lamkin*, 34 Ark. 598.

¹³ *Barrett v. Stradl*, 73 Wis. 385. And see *Faloon v. Simshauser*, 130 Ill. 649.

¹⁴ *Barrett v. Stradl*, 73 Wis. 385. And see *Faloon v. Simshauser*, 130 Ill. 649.

¹⁵ *Barrett v. Stradl*, 73 Wis. 385. And see *Faloon v. Simshauser*, 130 Ill. 649.

¹⁶ *Barrett v. Stradl*, 73 Wis. 385. And see *Faloon v. Simshauser*, 130 Ill. 649.

¹⁷ *Barrett v. Stradl*, 73 Wis. 385. And see *Faloon v. Simshauser*, 130 Ill. 649.

ments, such improved condition of the property will be presumed to continue, unless the contrary is shown.¹⁷

§ 439. **Mines and sub-strata.**—It is a fundamental rule that whoever owns the surface of land is presumed to own whatever lies beneath it. It is a further rule that mineral deposits in place are a part of the freehold, and pass with it by any form of alienation. But it has long been settled that estates may be held in the sub-strata of land as well as in the surface and that when the owner of land, by a proper conveyance, has assigned his rights in any of the sub-strata a severance of estate is immediately effected. Thenceforward the owner of the soil may cultivate, enclose, and reside upon his estate for any length of time but his possession will not affect in the slightest degree the estate below him which has been severed by his deed.¹⁸ In like manner, the owner of the mineral estate may enter upon and occupy it in any manner that its nature may permit, but his possession will never extend upwards and attach to the surface. As between the parties the conveyance fixes their mutual rights and if the deed has been recorded it furnishes constructive notice of such rights to all persons thereafter dealing with the land.¹⁹

In such event, if a third person enters either estate and maintains possession for the entire statutory period of limitation, he will acquire title only to so much as he has actually held, but his title will not extend above or below the estate on which he enters.²⁰ It would seem that these points are now well settled and the doctrines they involve have received a general acceptance. We may therefore defer further consideration of them and direct our attention to the more difficult and perplexing questions that our subject presents.

It will frequently happen that lands are of value to the owners only because of the subterranean deposits. The sur-

¹⁷ *Douglass v. Ruffin*, 38 Kan. 530.

¹⁸ *Catlin Coal Co. v. Lloyd*, 180 Ill. 398; *Murray v. Allred*, 100 Tenn. 100.

¹⁹ *Delaware & Hudson Canal Co. v. Hughes*, 183 Pa. St. 66; *Westmoreland, etc. Co. v. De*

Witt, 130 Pa. St. 235; *Murray v. Allred*, 100 Tenn. 100.

²⁰ *Caldwell v. Copeland*, 37 Pa. St. 527; *Kingsley v. Hillside Coal Co.*, 144 Pa. St. 613; *Murray v. Allred*, 100 Tenn. 100; *Catlin Coal Co. v. Lloyd*, 180 Ill. 393.

face is permitted to remain unenclosed and uncultivated and while in this condition persons may enter upon it, occupying, enclosing, and cultivating the same, or parts thereof, and such possession may be continued for the full period of limitation. Ordinarily such a possession must give to the occupant a valid adverse title, not only to surface but to the sub-strata as well. But it may be that while the owner has neglected the surface he has been in the actual occupation of the mines underneath same, operating them in the usual manner during all of the time that the adverse possession has been ripening. If we shall concede that the adverse claimant has acquired a valid title to the surface, or to so much thereof as he shall have actually enclosed and occupied, must we also concede that his ownership extends to the underlying minerals? It would seem that we must, unless it can be shown that the owner of a freehold may, for his own uses, effect a severance of the minerals from the surface by his own acts, and if this shall be permitted that the fact of working the mines shall operate as notice of such severance to other persons in the same manner as the constructive notice arising from the recording of a deed. In a late case where this question was presented it was held that the owner, in the exercise of his legal rights, might elect to develop and operate the sub-strata and leave the surface untitled and unenclosed. That in the event of his election so to do a virtual severance of the surface and underlying minerals was effected, and that the necessary erections, shafts, gangways, etc., for the operation of the mines was a sufficient notice of his possession of his subterranean estate. Hence, that an adverse possession of the surface by one who had notice did not extend to the coal under the surface.²¹

²¹ Delaware & Hudson Canal 38 L. R. A. 826. This seems to Co. v. Hughes, 183 Pa. St. 66, be a case of first impression.

II. DISPUTED BOUNDARIES.

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| <p>§ 440. Land enclosed by mistake.</p> <p>441. Continued — Opposing views.</p> <p>442. Agreed boundary.</p> <p>443. Boundary by parol agreement.</p> | <p>§ 444. Acquiescence in boundary.</p> <p>445. Existence of dispute.</p> <p>446. Adverse entry by tenant—Tacking.</p> |
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§ 440. Land enclosed by mistake.—No small portion of the litigation concerning land titles grows out of the disputes of co-terminous proprietors with respect to boundaries, and particularly where one, under a mistake of fact, has enclosed or occupied a tract in reality the property of the other. In determining the rights of the parties in such a case the authorities are not agreed and the question seems to be one of much doubt. It will often happen that a person, through ignorance or mistake, but with no intention of claiming beyond the true line, will enclose the land of another and thereafter use and occupy it as his own. It has been maintained, in cases of this character, that such a possession, having been taken by mistake and not under a claim of right, will not be adverse to the true owner or operate to work a disseizin.²² But, while this position is supported by a formidable line of authorities it cannot be taken as expressive of the true rule and in those cases where the doctrine has been applied it seems to have been frequently subjected to much exception and qualification, and, in many instances, peculiar circumstances have intervened to shape the decisions of the courts.

It is contended, in the cases that support this position, that the real test is the intention of the party holding beyond the true line, and that, if his intention is to claim only to the true

²² See *Wallbrum v. Ballem*, 68 Mo. 164; *Keen v. Schnedler*, 92 Mo. 516; *Hutchings v. Morrison*, 72 Me. 334; *Worcester v. Lord*, 56 Me. 265; *Mills v. Penny*, 74 Iowa, 172; *Howard v. Reedy*, 29 Ga. 152; *Wood v. Willard*, 37 Vt. 377; *Jones v. Pashby*, 67 Mich. 459; *Watrous v. Morrison*, 33 Fla. 261; *Taylor v. Fomby*, 116 Ala. 621; *McDonald v. Fox*, ²⁰ Nev. 364; *Sartain v. Hamilton*, 12 Tex. 719.

line, wherever it may be, his possession beyond such line cannot be adverse.²³ The doctrine proceeds upon the theory that possession, to be adverse, must be held under a claim of right, and hence, that there can be no adverse possession without an intention to claim title;²⁴ therefore, although a party claims to the limit of his enclosure, because he believes it to be the line of his land, yet, if he does not intend so to claim if it should be beyond such line, then, the intent to claim title not existing coincidently with his possession the holding is not adverse.²⁵

While we may admit the abstract justice of the theory, viewed simply as an ethical proposition, yet from a practical standpoint and in the light of established legal rules, the distinction seems subtle, and, to some extent, dangerous. In every case, not originating in fraud, the claim of ownership is only for the lot or parcel to which the party is of right entitled; the adverse enclosure or occupancy is made primarily with special reference to this claim only; no encroachment is intended at the time and hence no claim in derogation of the rights of the adjoining proprietor exists, yet the legal effect of the occupancy is that of an adverse holding and the occupant's continuous enjoyment of what he believes to be his own land satisfies all the requirements of the law of limitation. The confusion which exists among the decided cases grows out of the fact that an attempt has been made to introduce a new principle into the law of adverse possession, whereby the stable evidence of visible possession under a claim of right has been complicated with an inquiry into the invisible motives and intentions of the occupant.²⁶

§ 441. Continued—Opposing views.—An equally formidable line of decisions supports the rule that, in all cases, if a

²³ *Krider v. Milner*, 99 Mo. 145, 17 Am. St. 549; *Alexander v. Wheeler*, 69 Ala. 340; *Wilson v. Hunter*, 59 Ark. 626; *McDonald v. Fox*, 20 Nev. 364, 22 Pac. Rep. 234.

²⁴ *Watrous v. Morrison*, 33 Fla. 261; *Battner v. Baxter*, 108 Mo. 311; *Preble v. Railroad Co.*, 85

Me. 260; *Hess v. Rudder*, 117 Ala. 525; *Grube v. Wells*, 34 Iowa, 148; *Lincoln v. Edgecomb*, 31 Me. 345.

²⁵ See *Williamson v. Hunter*, 59 Ark. 626; *Finch v. Ullman*, 105 Mo. 255; *McDonald v. Fox*, 20 Nev. 364.

²⁶ *French v. Pearce*, 8 Conn. 439.

person enters and occupies land not embraced in his title, claiming it as his own, and so continues for the requisite statutory period of limitation, he thereby becomes invested with the legal title to same,²⁷ notwithstanding his entry and possession may have been founded upon a mistake.²⁸

The cases which sustain this position rest on possession alone. (This, with its attendant qualities, is regarded as the essential and important fact. According to these cases it is the visible occupation with an intention to possess that constitutes the adverse character of the holding, the remote views or beliefs of the possessor being but immaterial circumstances.²⁹ The holding being adverse, the true owner and all others interested, are charged with notice of the extent of the occupancy, and the visible physical fact, it is contended, should not be overcome by mere refinements based upon mental *status*.³⁰

There is a line of cases that, to some extent, seems to occupy a neutral ground. According to these cases if there is an aggressive claim to the ownership of land within visible boundaries a foundation may be laid for an adverse possession, notwithstanding there may be a mistake as to the line.³¹ Thus, if one in ignorance of his actual boundaries takes and holds possession by mistake up to a certain line, but under a claim and in the belief that it is the true line, with the intention to

²⁷ *McNamara v. Seaton*, 82 Ill. 898; *Brown v. Anderson*, 90 Ind. 94; *Hoffman v. White*, 90 Ala. 354; *Holloran v. Holloran*, 149 Mass. 298; *Battner v. Baker*, 108 Mo. 311; *Tucker v. Smith*, 68 Tex. 473; *Brown v. Bridges*, 31 Iowa, 138; *Seymour v. Carll*, 31 Minn. 81; *Metcalf v. McCutchan*, 60 Miss. 145.

²⁸ *Yetzer v. Thoman*, 17 Ohio St. 130; *Caufield v. Clark*, 17 Ore. 473; *Russell v. Maloney*, 39 Vt. 579; *George v. Thomas*, 16 Tex. 74; *Levy v. Yerga*, 25 Neb. 764; *Ramsey v. Glenny*, 45 Minn. 401; *Mode v. Long*, 64 N. C. 433; *French v. Pearce*, 8 Conn. 439; *Grimm v. Curley*, 43 Cal.

251; *Tex v. Pflug*, 24 Neb. 666; *Cole v. Parker*, 70 Mo. 372; *Bunce v. Bidwell*, 43 Mich. 542.

²⁹ *Yetzer v. Thoman*, 17 Ohio St. 130; *French v. Pearce*, 8 Conn. 439; *Metcalf v. McCutchen*, 60 Miss. 145; *Meyer v. Wigman*, 45 Iowa, 579; *Obernalte v. Edgar*, 28 Neb. 70.

³⁰ *Erck v. Church*, 87 Tenn. 575, 4 L. R. A. 641 *Hutchings v. Morrison*, 72 Me. 331; *Greene v. Anglemire*, 77 Mich. 168.

³¹ See *Handlan v. McManus*, 100 Mo. 124; *Erck v. Church*, 87 Tenn. 575; *Caufield v. Clark*, 17 Ore. 473; *Wilson v. Hunter*, 59 Ark. 626.

hold to the line, then, it is conceded, if such possession has the requisite duration and continuity it will ripen into title.³² In this line of cases it is a cardinal principle that no right or title can be gained against the owner by mere possession. To bar an action for the recovery of the land the possession must be accompanied by an intent to hold adversely to the right of the true owner, and the possession must not originate in an admitted possibility of mistake.³³

§ 442. **Agreed boundary.**—While there is much uncertainty and conflict of authority with respect to the legal *status* and rights of parties in the possession of lands enclosed by mistake, it would seem that the law is well settled where such enclosure is made as a result of the mutual agreement of the co-terminous proprietors. A review of the cases indicates the almost universal rule as, that where parties agree upon a boundary, and such agreement is followed by possession of the parcels, in accordance with the line agreed upon, for the limitation period, then notwithstanding such boundary may not coincide with the true line neither party will be permitted to dispute the correctness of such location or disturb the possession of the other.³⁴ Thus, where the parties have erected a fence, in accordance with a line fixed by mutual agreement, and each has held and occupied up to his side of the fence for twenty years, notwithstanding such fence may vary from the true line neither can maintain ejectment against the other.³⁵ In like manner, if parties are uncertain as to their boundaries and cause a line to be run by a surveyor, if the line so found by the surveyor is

³² *Hutchings v. Morrison*, 72 Me. 331.

³³ See *Watrous v. Morrison*, 33 Fla. 261; *Alexander v. Wheeler*, 69 Ala. 340; *Abbott v. Abbott*, 51 Me. 584; *Ayers v. Reidel*, 84 Wis. 276.

³⁴ *Harn v. Smith*, 79 Tex. 310; *Brown v. Leete*, 6 Sawyer (Ct.) 332; *Darst v. Enlow*, 116 Ill. 475; *Hoffman v. White*, 90 Ala. 354; *Wingler v. Simpson*, 93 Ala. 201; *Tracy v. Newton*, 57 Iowa, 210; *Tobey v. Secor*, 60 Wis. 310; *Rider v. Maul*, 46 Pa.

St. 376; *White v. Spreckels*, 75 Cal. 610; *Sheldon v. Atkinson*, 38 Kan. 14; *Walker v. Simpson*, 80 Me. 143; *Atchison v. Pease*, 96 Mo. 566; *Jones v. Smith*, 64 N. Y. 180; *Bloomington v. Bloomington*, etc. Ass'n, 126 Ill. 221.

³⁵ *Burrell v. Burrell*, 11 Mass. 294; *Gilchrist v. McGee*, 9 Yerg. (Tenn.) 455; *Eaton v. Rice*, 8 N. H. 381; *Lecompte v. Toudouze*, 82 Tex. 208, 17 S. W. Rep. 1047.

accepted and agreed upon as the true line, such recognition will preclude them from questioning its accuracy or denying that it is the true line after the lapse of the statutory period of limitation.³⁶ And, generally, where there is a dispute as to the true division line, and both parties are ignorant of its proper location, and they fix and agree upon a permanent boundary, and take possession accordingly, the agreement is binding upon them and those claiming under them.³⁷

There would seem to be a few cases which apparently militate against the rule, but the exceptions are few and not well settled. It would seem that these cases proceed on the equitable doctrines of mistake and involve the fine-spun metaphysical distinctions heretofore noticed. That is, that the parties in fixing the boundary do so with no intention of claiming title to other than their own land; that the line so agreed upon is intended to conform to the calls of their respective deeds or other muniments of title; that the intent to claim title is dependent on an implied condition that the line agreed upon is the true line. Hence, if it shall so happen that the location is erroneous and the mistake in running the line is mutual, and possession has been taken and held under such mistake, then such possession will not be adverse on the part of either party,³⁸ because, it is said, the intention is not absolute but provisional.³⁹ Thus in a case where a fence had been maintained on a wrong divisional line by mistake and it was found by the court as a matter of fact that "none of the parties had any idea of maintaining any line but the true divisional line, and that they occupied according to the fence only because they supposed it was on the true divisional line between them," it was held, as a matter of law, that such possession was not adverse, the unconditional intent to claim title to the extent of the occu-

³⁶ *Boyd v. Graves*, 17 U. S. 513, 4 L. Ed. 628; *Faught v. Holway*, 50 Me. 24; *Bauer v. Gottmanhausen*, 65 Ill. 499; *Foulke v. Stockdale*, 40 Iowa, 99.

³⁷ *Krider v. Milner*, 99 Me. 145, 17 Am. St. 549; *Pickett v. Nelson*, 71 Wis. 542; *George v.*

Thomas, 16 Tex. 74; *Hooten v. Comerford*, 152 Mass. 591.

³⁸ *Knowlton v. Smith*, 36 Mo. 507; *Houx v. Batteen*, 68 Mo. 84; *Howard v. Reedy*, 29 Ga. 154. But compare *Watt v. Gamahl*, 34

290.
³⁹ *Worcester v. Lord*, 56 Me. 266.

pancy being wanting.⁴⁰ But the rule, as first stated, seems to be too well settled to be shaken. It is fully in consonance with the spirit of our land laws, which are ever inclined to the stability and repose of titles, and where lines have been located and monuments established by the joint action of the parties it is dangerous in the extreme to permit them to be overturned in after years by the application of subtle principles depending for their effect on undisclosed mental conditions.

§ 443. **Boundary by parol agreement.**—Nor is it necessary for full legal effect that a boundary line agreement, as discussed in the preceding section, shall have been reduced to writing. It is sufficient even though it rests in parol, where it has been followed either by silent acquiescence or such unequivocal acts as will raise an implication that an agreement has been entered into. In such event both parties will be conclusively bound thereby and both will be estopped from disputing the correctness of the line.⁴¹ It is immaterial, in such a case, whether the parties are right or wrong in their belief that the line so established is precisely where it should be;⁴² it is enough that they have agreed upon it, and the enforcement of the agreement will not be prevented by the statute of frauds.⁴³ Neither is such an agreement within the meaning of the provisions of the law that regulates the manner of conveying lands or other real property.⁴⁴ The reason for this seems to be that the parties do not undertake to either acquire or transmit title to land, but simply, by agreement, fix and determine the situation and relative location of the thing they already own, their only purpose being to identify their several holdings and make certain that which they previously regarded as uncertain.⁴⁵

⁴⁰ *Dow v. McKenney*, 64 Me. 138.

⁴¹ *Edwards v. Smith*, 71 Tex. 156; *Bloomington v. Bloomington*, etc. Ass'n, 126 Ill. 221; *Krider v. Milner*, 99 Mo. 145; *Archer v. Helm*, 69 Miss. 730; *Tate v. Foshee*, 117 Ind. 322, 20 N. E. Rep. 241.

⁴² *Harn v. Smith*, 79 Tex. 310.

⁴³ *Jones v. Pashby*, 67 Mich. 459; *Jacobs v. Moseley*, 91 Mo. 457; *Bobo v. Richmond*, 25 Ohio St. 115.

⁴⁴ *Aycock v. Kimbrough*, 71 Tex. 333; *Hogey v. Detwiler*, 35 Pa. St. 409.

⁴⁵ *Lecomte v. Toudouse*, 82 Tex. 208.

A different case would be presented if the parties actually knew where the divisional line was and in such case the agreement might be held invalid because, in effect it would amount to a parol conveyance of land contrary to the statute,⁴⁶ but the authorities generally unite in declaring that where the line is in dispute and both are ignorant of its true location, an agreement entered into to end the dispute, followed by possession in accordance therewith, binds the parties and those claiming under them notwithstanding the agreement was not in writing.⁴⁷

§ 444. *Acquiescence in boundary.*—As we have seen, an express agreement respecting boundaries, followed by possession for the statutory period of limitation, is conclusive of the rights of the parties with respect to the land. But, to produce this result, it is by no means necessary that an actual agreement should be shown, for the authorities are practically unanimous in declaring that simple acquiescence in the location of a boundary line, with occupation in accordance therewith, is conclusive evidence of such an agreement, and will preclude the parties from denying its correctness.⁴⁸ In some of the cases the courts have reached their conclusions by applying the principles of estoppel, that is, that the conduct and actions of the parties, if not evidence of a prior agreement may yet be sufficient to prevent the setting up of any claim inconsistent with such conduct or tending to question the truth of the facts such conduct necessarily imports.⁴⁹ But, however the conclusions may have been arrived at, the general result is the same in all of the cases, and as it is this result and not the motives which produced it that most concern us the methods employed are immaterial.

⁴⁶ *George v. Thomas*, 16 Tex. 89; *Turner v. Baker*, 76 Mo. 343; *May v. Baskin*, 20 Miss. 428.

⁴⁷ *Krider v. Milner*, 99 Mo. 145; *Watrous v. Morrison*, 33 Fla. 261, 14 So. Rep. 805; *Jamison v. Pettit*, 69 Ky. 669.

⁴⁸ *Glover v. Wright*, 82 Ga. 115; *Koenigs v. Jung*, 73 Wis. 178; *Cleveland v. Obenchain*, 107 Ind. 591; *Burris v. Fitch*, 76

Cal. 395; *Case v. Trapp*, 49 Mich. 59; *Hubbard v. Stearns*, 86 Ill. 35; *Sherman v. Kane*, 86 N. Y. 57; *Davis v. Judge*, 46 Vt. 655; *Edwards v. Smith*, 71 Tex. 156; *Bloomington v. Bloomington, etc. Ass'n*, 126 Ill. 221.

⁴⁹ *Wilmarth v. Woodcock*, 66 Mich. 331; *Cleveland v. Obenchain*, 107 Ind. 591; *Galbraith v. Lunsford*, 87 Tenn. 89; *Elden v.*

Where there has been an actual agreement it does not seem that in ascertaining its effect, or in order to give it validity, it is necessary that it should be supported by acquiescence or acts from which an estoppel may spring. It is enough that it is made under circumstances free from such facts as would authorize a court of equity to set it aside, and, when this is the case, although the parties may have been mistaken in their belief the agreement will be allowed to stand.⁵⁰

A dissenting case or two may be found in which the question of intent is permitted to control; as where adjoining proprietors have acquiesced in the location of a line dividing their holdings under mistake or ignorance of the true line but without intent to claim beyond such line when discovered. In such cases it has been held that such acquiescence will not work a disseizin in favor of either.⁵¹ But this only opens the dangerous and uncertain field of psychical speculation which permits questions of fact, demonstrable by outward and visible acts, to be determined by mental conditions that may be varied and changed by mere caprice.

§ 445. *Existence of dispute.*—In most of the cases wherein the questions discussed in the paragraphs immediately preceding have been presented for determination, the principle has been repeatedly announced that, to give validity to a parol agreement of boundary, there must have existed a doubt, uncertainty or dispute with respect to the actual line.⁵² In a few instances it has been held that where adjoining owners agree upon a division line and continue to occupy up to the line so agreed upon for the statutory period of limitation, the agreement becomes binding and conclusive without respect to any dispute concerning the location of the line or the extent of the respective holdings.⁵³ But we can hardly imagine a case of this kind; that is, a case in which there was not some element of controversy, and agreements respecting boundaries are gen-

Elden, 76 Wis. 435; Lagon v. Glover, 77 Tex. 448.

⁵⁰ Lecomte v. Toudouze, 82 Tex. 208.

⁵¹ See Crawford v. Ahrnes, 103 Mo. 88.

⁵² See Miller v. McGlann, 63 Ga. 435; Hartung v. Witte, 59 Wis. 285; Lewallen v. Overton, 28 Tenn. 76; Cutler v. Callison, 72 Ill. 113.

⁵³ Helm v. Wilson, 76 Cal. 476.

erally made because of the existence of some doubt or uncertainty as to where the division line should be run.

§ 446. **Adverse entry by tenant—Tacking.**—Notwithstanding the lack of unanimity in the decided cases we may yet regard the rule as fairly well established by a preponderance of authority, that an entry upon and more than twenty years' subsequent possession of land beyond the line of his own lot by an adjoining owner under a claim of title, and under a mistake as to the location of the boundary line, must be deemed adverse to the true owner, so as to extinguish his title and vest it in the party in possession. This being true, it would seem that it is immaterial whether such possession was taken and subsequently held by the adverse occupant in person or by others acting under and in privity with him, and that the doctrine of tacking may be applied in this as in other cases of adverse holding. Therefore where an original adverse entry is made by the tenant of an adjoining owner, under a mistake by both as to the actual location of the boundary line, and this occupation is recognized and approved by the landlord, under the mistaken belief that the land so held is within the limits of his title, and where such occupation is followed by successive leaseings of the entire land to the same or to other tenants, an adverse possession vests in the landlord, which, if continued for the statutory period will ripen into an indefeasible title. In such event the connected, successive and continuous possession of the landlord by his tenants, his heirs and assigns, may be tacked together so as to form the uninterrupted possession required by law to sustain an adverse title.⁵⁴

⁵⁴ Ramsey v. Glenny, 45 Minn. 401.

III. RELATION OF PARTIES.

§ 447. Introduction.	§ 455. Husband and wife.
448. Cotenants.	456. Parent and child.
449. Continued — Ouster and hostile possession.	457. Continued — Child vs. parent.
450. Continued — Grantee of cotenant.	458. Dower rights.
451. Remaindermen and life tenants.	459. Adverse claim by tenant.
452. Remainderman and strangers.	460. Continued — Adverse claim before expiration of term.
453. Mortgagee in possession.	461. Tenant holding over.
454. Possession under parol gift.	462. Adverse entry under deed from tenant.

§ 447. Introduction.—Questions growing out of assertions of title by adverse possession and limitation must frequently turn on the relation sustained to each other by the contending parties. These relations will often exert a marked influence on the rights of the parties and in many cases will constitute the determining factor of the controversy. In this article some of the more salient features of the subject will be briefly considered.

§ 448. Co-tenants.—The rule is well established that the possession of one tenant in common is, in law, the possession of all his cotenants, the claim, in such case, originating in one common right. Nor can such common tenant ordinarily make his possession adverse to his cotenants by any of the acts which if performed by a stranger, would be competent evidence to prove an adverse holding,⁵⁵ for his possession must be presumed, in the absence of evidence to the contrary to have originated with the consent of the common owners.⁵⁶ In such case there can be no disseizin or adverse possession until there has been a disclaimer by the assertion of an adverse title,⁵⁷

⁵⁵ Prescott v. Nevers, 4 Mason (C. Ct.), 326; Hignite v. Hignite, 65 Miss. 447; Hudson v. Coe, 79 Me. 83; Busch v. Huston, 75 Ill. 343.

⁵⁶ McCray v. Humes, 116 Ind.

103; Page v. Branch, 96 N. C. 97; Northrop v. Marquam, 16 Oreg. 173.

⁵⁷ Rodney v. McLaughlin, 97 Mo. 426; Lindley v. Groff, 37 Minn. 338; Fry v. Payne, 82 Va.

and notice thereof to the other owners,⁵⁸ either direct or inferentially by notorious acts. Upon this point all of the authorities are practically agreed.⁵⁹

The reason for this, as above shown, lies in the fact that, in law, the entry of one is the entry of all. Either has the right to actually possess the land and such possession, when taken, will be presumed to be in accordance with his title—rightful, rather than wrongful—until some notorious and unequivocal act of exclusion shall have occurred.⁶⁰ Therefore acts which might properly be held to constitute a disseizin if done by a stranger will usually have no such effect if done by a cotenant, and notwithstanding the tenant in possession may cultivate the land, or remove the timber, or take the rents, without any accounting with or payments to his cotenants of any share, yet these acts and circumstances will not ordinarily be considered as adverse in their character or as working an ouster, but will usually be held to have been done in support of the common title.⁶¹ In every case the acts of ownership by one tenant, which if done by a stranger would operate as a disseizin of the other tenant, must be done in the assertion of an independent title inconsistent with that of the cotenants, and be of such a character that it is known, by those in derogation of whose title they are done, that this is so.⁶² Unless this shall be made affirmatively to appear the legal presumption must control that he is keeping possession, not only for himself but for his cotenants according to their respective interests.⁶³

759; *McDowell v. Sutlive*, 78 Ga. 142; *Killmer v. Wuchner*, 74 Iowa, 359.

⁵⁸ *Boyd v. Boyd*, 176 Ill. 40; *Wheeler v. Taylor*, 32 Oreg. 421; *Smith v. Water Co.*, 16 Utah, 194; *Benoist v. Rothschild*, 145 Mo. 399.

⁵⁹ *Roberts v. Morgan*, 30 Vt. 325; *Mansfield v. McGinness*, 86 Me. 118; *Burns v. Byrne*, 45 Iowa, 285; *Hill v. Gray*, 45 S. C. 91; *Ball v. Palmer*, 81 Ill. 370; *Day v. Davis*, 64 Miss. 253.

⁶⁰ *Colburn v. Mason*, 25 Me. 434; *Winters v. Haines*, 84 Ill.

585; *Odom v. Weathersbee*, 26 S. C. 244.

⁶¹ *Thornton v. York Bank*, 45 Me. 158; *Busch v. Huston*, 75 Ill. 343; *McGee v. Hall*, 26 S. C. 179; *Riddle v. Whitehill*, 135 U. S. 621; *Rodney v. McLaughlin*, 97 Mo. 426; *Lagoria v. Dozier*, 91 Va. 492.

⁶² *Ingalls v. Newhall*, 139 Mass. 273; *Greenhill v. Biggs*, 85 Ky. 155; *Oglesby v. Hollister*, 76 Cal. 136.

⁶³ *Roberts v. Morgan*, 30 Vt. 325; *Burns v. Byrne*, 45 Iowa, 285; *Mansfield v. McGinness*, 86

§ 449. Continued—Ouster and hostile possession.—But the rule is equally well settled that a cotenant may so enter and hold as to render his entry and possession adverse and an ouster of the other owners,⁶⁴ although the questions which the application of the rule may raise are frequently of much difficulty. Usually, to inaugurate an adverse possession there must be an actual ouster and a positive exclusion of the other cotenants, and while this fact has, in some instances, been allowed to rest in inference, particularly where there has been a long and undisturbed possession by the claimant accompanied by open and notorious acts of exclusive ownership,⁶⁵ yet, as a general proposition, it is something that must be strictly proved, and the evidence offered must be of a clear, satisfactory and convincing character.⁶⁶

Where, however, it is satisfactorily made to appear that there has been a long-continued possession by one cotenant, uninterrupted and with the knowledge of the other cotenants, and without claim or demand for possession or participation in the profits by them, and that such possession has been accom-

Me. 118. A showing that one tenant in common has been in actual, exclusive, and undisturbed possession of all the land, taking the entire profits and paying taxes thereon for more than twenty years, and that he has erected a valuable residence and other buildings and made improvements without protest or objection, is such evidence of adverse possession and ouster of the cotenants as will prevent the latter from maintaining an action for the land. *Hutson v. Hutson*, 130 Mo. 229, 40 S. W. Rep. 886.

⁶⁴ *Greenhill v. Biggs*, 85 Ky. 155; *English v. Powell*, 119 Ind. 93; *Oglesby v. Hollister*, 76 Cal. 136; *Wheeler v. Taylor*, 32 Oreg. 421.

⁶⁵ *Alexander v. Kennedy*, 19 Tex. 488. And see *English v. Powell*, 119 Ind. 93; *Dugan v.*

Follett, 100 Ill. 581; *Feliz v. Feliz*, 105 Cal. 1.

⁶⁶ *Ball v. Palmer*, 81 Ill. 370.

A finding of ouster of a tenant in common by his cotenant, essential to make the sole possession of the latter adverse, may rest upon evidence tending to show that for thirty years or more the land had been known by his name; that such acts of ownership as the character of the land was susceptible of were exercised by him; that he procured a tax deed which he caused to be placed of record, and that upon his death the property was divided among his heirs, and that neither the former tenant nor any of his successors made any claim to the premises during such time. *La Fountain v. Dee*, 110 Mich. 347, 68 N. W. Rep. 220.

panied by outward acts of exclusive ownership of an unequivocal character, this will ordinarily furnish sufficient evidence of ouster upon which to base a title by adverse possession. In such event the statute of limitations will commence to run against the evicted cotenants from the time that notice can be shown to have been brought home to them.⁶⁷

§ 450. Continued—Grantee of cotenant.—Under the general rule that one tenant in common cannot make his possession adverse to his cotenant, it has frequently been held that a deed by a cotenant to a stranger even though it purports to convey the entire estate has no other effect than to invest the vendee with the rights of the vendor, and does not change the relation which subsisted between such vendor and his cotenant. Under this line of decisions a deed of this character will not constitute an actual ouster of the cotenant nor lay the foundation for an adverse holding.⁶⁸ The same rule has been held to apply to the purchaser of the interest of a cotenant at execution sale, as well as to the vendee of such purchaser.⁶⁹

It cannot be denied but that the foregoing positions are supported by much legal reason. They are based upon the ancient formula that the possession of one tenant is the possession of all and that mere lapse of time under such occupancy, either by the tenant in possession or his grantee, will not ripen a title by adverse possession. In such event the question of intent becomes immaterial, the presumption being that acts of ownership are referred to the actual condition of the title and the relation of the parties thereunder.

On the other hand, numerous cases affirm the doctrine that if one tenant conveys the whole estate in fee, and his grantee enters under such conveyance claiming title and holding exclusive possession of the land, the conveyance, entry and possession will be deemed adverse to the title and possession of the other cotenants, and amount to an actual disseizin.⁷⁰ The

⁶⁷ *Wheeler v. Taylor*, 32 Oreg. 421; *Boyd v. Boyd*, 176 Ill. 40.

⁶⁸ *Page v. Branch*, 97 N. C. 97, 2 Am. St. 281; *Holly v. Hawley*, 39 Vt. 525; *Benedict v. Torrent*, 83 Mich. 181, 21 Am. St. 589.

⁶⁹ *Ward v. Farmer*, 92 N. C. 93.

⁷⁰ *Fuller v. Swensberg*, 106 Mich. 305; *McDowell v. Sutlive*, 78 Ga. 142; *Rutter v. Small*, 68 Md. 133, 6 Am. St. 434; *Alexander v. Kennedy*, 19 Tex. 496; *Unger v. Mooney*, 63 Cal. 586.

principle by which this doctrine is supported seems to be that a conveyance in fee and entry under it, with exclusive possession, are notorious and unequivocal acts of ownership of such a nature as to give notice to the cotenant that the entry and possession are hostile to his title.⁷¹ This is further strengthened by the doctrine that where a person enters upon land under a claim of title evidenced by a deed, his entry and possession are referred to such deed, and he is deemed to have a seizin of the land co-extensive with the boundaries stated in such deed, where there is no actual adverse occupancy of any part of the land so described by any other person.

The volume of authority seems to be in consonance with the views last above presented and the general rule may be stated as follows: A conveyance by one cotenant, purporting to include the entire land and estate, and a subsequent occupancy by the grantee for the period of limitation prescribed by the statute, with a claim of title and exclusive ownership, will constitute an ouster of the other tenants and create a bar to recovery by them.⁷² In most of the cases which announce the rule the question of intent is strongly emphasized and the absence of any recognition of the claims of the other tenants becomes a material circumstance.⁷³ Where there are no facts or circumstances from which a contrary intention may reasonably be inferred, the occupancy and exclusive enjoyment under a deed of all of the land and the entire estate, with the knowl-

King v. Carmichael, 136 Ind. 20; Long v. Stapp, 49 Mo. 506; Covington v. Stewart, 77 N. C. 148; Hinkley v. Greene, 52 Ill. 223; Kinney v. Slatery, 51 Iowa, 353. A tenant in common took possession of the entire property and divided it into town lots, which he sold from time to time to various persons. *Held*, that the statute of limitations ran in favor of said vendees as against the cotenants of the vendor, and at the expiration of seven years peaceable and uninterrupted possession, they would have a valid

prescriptive title. *Cain v. Furlow*, 74 Ga. 674.

⁷¹ See *Highstone v. Burdette*, 61 Mich. 54; *Ellington v. Ellington*, 103 N. C. 54; *Burns v. Headerick*, 85 Tenn. 102; *Brown v. Bocquin*, 57 Ark. 97.

⁷² *Price v. Hall*, 140 Ind. 314; *Sands v. Davis*, 40 Mich. 14; *Hodges v. Eddy*, 38 Vt. 327; *Foulke v. Bond*, 41 N. J. L. 527; *Higbee v. Rice*, 5 Mass. 844.

⁷³ See *Maple v. Stevenson*, 122 Ind. 368; *Evans v. Templeton*, 69 Tex. 375; *Culver v. Rhodes*, 87 N. Y. 354; *Cummings v. Wyman*, 10 Mass. 464.

edge, actual or constructive, of the tenants out of possession, will be given effect as an ouster, and, if continued for the statutory period, will constitute a *prima facie* title by adverse possession. But if the occupant does anything that amounts to a recognition of the claim of the tenants out of possession, or in any way acknowledges their interests in the land, this will be sufficient to overcome the apparent intention arising from occupancy under a deed as above stated.⁷⁴

§ 451. **Remaindermen and life tenants.**—It is a general and well established rule that as between the owner of a life estate and the remainderman or reversioner there can be no adverse possession and that no act of the life tenant will operate to defeat the estate of the expectant owner.⁷⁵ So long as the life estate continues the possession of the tenant is considered for all practical purposes the possession of the remainderman,⁷⁶ or, in any event, it is a possession consistent with the title of the remainderman.⁷⁷

It follows, therefore, that if the life tenant is precluded from asserting any rights in derogation of the expectant interests, so also will be those who claim by, through or under such life tenant.⁷⁸ Hence, a sale by the owner of the particular estate will not affect the rights of those entitled in remainder or reversion,⁷⁹ the conveyance, in such case, passing no greater estate than the grantor could lawfully claim.⁸⁰ From this it necessarily follows that the possession of a purchaser from the

⁷⁴ Price v. Hall, 140 Ind. 314, 49 Am. St. 196.

⁷⁵ Meacham v. Bunting, 156 Ill. 586; Sutton v. Casaeleggi, 77 Mo. 397; Plackney v. Burrage, 31 N. J. L. 21; Hanson v. Johnson, 62 Md. 25; Moore v. Luce, 29 Pa. St. 260.

⁷⁶ Brown v. Moore, 74 Mo. 633; Gernet v. Lynn, 31 Pa. St. 94;

⁷⁷ Bedell v. Shaw, 59 N. Y. 46; Schroeder v. Tomlinson, 70 Conn. 348.

Lindley v. Groff, 37 Minn. 338; Keith v. Keith, 80 Mo. 125.

⁷⁸ Christie v. Gage, 71 N. Y.

189; Burns v. Headerick, 85 Tenn. 102.

⁷⁹ McClaskey v. Barr, 42 Fed. Rep. 609; Barrett v. Strahl, 73 Wis. 385; Rohn v. Harris, 134 Ill. 525; Gernett v. Lynn, 31 Pa. St. 94; Henley v. Wilson, 77 N. C. 216; Bagley v. Kennedy, 81 Ga. 721; Pickett v. Doe, 74 Ala. 122.

⁸⁰ Thompson v. Simpson, 123 N. Y. 270; Cook v. Caswell, 81 Tex. 678; Mettler v. Miller, 129 Ill. 630; Menger v. Carruthers, 57 Kan. 425.

life tenant cannot, during the latter's life, become adverse to the reversioner or remainderman.⁸¹

But a deed executed to evidence a conveyance of the character just mentioned would still be color of title, and a possession thereunder after the right of entry by the remainderman had accrued would be adverse to his interest.⁸² And if a possession so commenced shall be continued for such period as the statute may prescribe for making an entry upon land, then, the deed, and the possession held under it, will constitute a bar to any action by the remainderman or those claiming under him.⁸³

It is possible, however, under some circumstances, to inaugurate an effective possession during the lifetime of one to whom a particular estate may have been given; as where a widow, to whom a life estate has been given by a will, renounces the estate granted to her and asserts a title and possession in her own right. In such event her open adverse possession will put the statute of limitations in motion against the remainderman.⁸⁴

§ 452. Remaindermen and strangers.—As a general rule of uniform observance no possession of lands can be deemed adverse to a party who has not, at the time, a right of entry and possession.⁸⁵ For this reason a disseizin of a life tenant, or the owner of any particular estate, has no effect upon rights held in remainder or reversion.⁸⁶ Such disseizin imposes no obligation upon the remainderman or reversioner to enter nor will the statute commence to run against them until the ter-

⁸¹ *Rohn v. Harris*, 130 Ill. 525; *Lamar v. Pearre*, 82 Ga. 354; *Templeton v. Twitty*, 88 Tenn. 595; *Clute v. Railroad Co.*, 120 N. Y. 267; *Lindley v. Groft*, 37 Minn. 338; *Kellar v. Stanley*, 86 Ky. 240.

⁸² *Burns v. Headerick*, 85 Tenn. 102; *Forrest v. Jackson*, 56 N. H. 357; *Hunt v. Wall*, 75 Pa. St. 413; *Jones v. Johnson*, 81 Ga. 293; *Barrett v. Stradl*, 73 Wis. 385; *Pendley v. Madison*, 83 Ala. 484.

⁸³ *Mole v. Folk*, 45 S. C. 265; *Brown v. Baraboo*, 98 Wis. 273.

⁸⁴ *Miller v. Foster*, 76 Tex. 479.

⁸⁵ *Devyr v. Schaefer*, 55 N. Y. 446; *Orthwein v. Thomas*, 127 Ill. 554; *Allen v. De Groodt*, 98 Mo. 159.

⁸⁶ *Wallingford v. Hearl*, 15 Mass. 471; *Moore v. Luce*, 29 Pa. St. 260; *Orthwein v. Thomas*, 127 Ill. 554; *Salmons v. Davis*, 29 Mo. 176; *Pierre v. Fernald*, 26 Me. 440; *Borders v. Hodges*, 154 Ill. 498.

mination of the particular estate, no matter how long the tenant thereof may have been disseized.⁸⁷

The statute, in some states, has disturbed the general rule above stated by introducing a new element on which to found an adverse title. In these states payment of taxes and possession under color of title for a determinate period, usually seven years, is sufficient to create a *prima facie* title that will prevail against the title of prior owners who rest under no disability. Under such a statute it has been held that where a person not in privity with the life tenant, or other owner of the particular estate, enters upon land under a deed purporting to convey the entire estate and continues such possession for seven years, paying all taxes legally assessed thereon, he thereby acquires a title that not only bars the life tenant but the remainderman as well.⁸⁸ It is urged, in support of this view, that the statute which confers title for payment of taxes and possession under color of title is imperative; and that, to prevent the acquirement of a bar under the same it is only necessary to pay taxes. It is further said, that the outstanding estate forms no impediment to the performance of this duty by the remainderman or reversioner; the taxes should be kept paid, not on anyone's particular interest in the land, but on the whole land, and notwithstanding it may be the duty of the owner of the particular precedent estate to pay such taxes, yet, as the statute requires payment on the entire interest in the land, no matter how it may be divided and owned, the whole estate may become barred against all of the owners if the duty is neglected by any of them.⁸⁹

⁸⁷ *Miller v. Ewing*, 6 Cush. (Mass.) 34; *Allen v. De Groodt*, 98 Mo. 159; *Sand v. Church*, 152 N. Y. 174; *Jackson v. Johnson*, 5 Cow. (N. Y.) 96. Thus, children inheriting land from their mother, subject to their father's rights as tenant by the curtesy, are not guilty of laches in remaining silent for more than thirty years, during which time their father was alive, and he

and his grantees laid out and platted a town on such land, and were in the possession thereof; for such possession was lawful and consistent with the father's estate, and neither the children nor their grantees had any right to disturb it. *Orthwein v. Thomas*, 127 Ill. 554.

⁸⁸ *Nelson v. Davidson*, 160 Ill. 254. And see *Enos v. Buckley*, 94 Ill. 458.

⁸⁹ *Enos v. Buckley*, 94 Ill. 458.

§ 453. **Mortgagee in possession.**—As we have seen, it is a general rule that neither a mortgagor nor his assignee of the equity of redemption can maintain ejectment against a mortgagee in possession of the mortgaged land,⁹⁰ his remedy to recover such possession being a bill in equity to redeem.⁹¹ It is a further rule that this right must be exercised within twenty years after it shall have accrued, and, in the absence of any statute to the contrary, an uninterrupted possession of the mortgaged premises by the mortgagee for the full period of limitation, under such circumstances as indicate a claim of right, will bar the mortgagor of all remedy either at law or in equity,⁹² except as his rights may have been saved by reason of disability.⁹³ In some states this is denied, and a special statute saves the right of redemption until actually barred by foreclosure. Where this statute obtains it would seem that a mortgagor may recover possession from his mortgagee at any time before foreclosure.⁹⁴

§ 454. **Possession under parol gift.**—A parol gift of land, of itself, is inoperative in law. This is universally conceded. It has been held to exert no greater force than a mere tenancy at will, which the donor may terminate at any time by an assertion of his legal rights,⁹⁵ and being in contravention of the statute of frauds is incapable of enforcement in a legal action. But such a gift is not altogether void, as some of the authorities would seem to affirm,⁹⁶ and, when coupled with other circumstances, may become the foundation of an unassailable

⁹⁰ *Johnson v. Elliott*, 26 N. H. 67; *Wells v. Rice*, 34 Ark. 346; *Connor v. Whitmore*, 52 Me. 185; *Johnson v. Sandhoff*, 30 Minn. 201; *Hubbell v. Moulson*, 53 N. Y. 225.

⁹¹ *Chapin v. Wright*, 41 N. J. Eq. 438; *Rowell v. Jewett*, 69 Me. 293; *Posten v. Miller*, 60 Wis. 494.

⁹² *Chapin v. Wright*, 41 N. J. Eq. 438; *Locke v. Caldwell*, 91 Ill. 417; *Crook v. Glenn*, 30 Md. 55; *Marks v. Robinson*, 82 Ala. 77.

⁹³ *Clark v. Potter*, 32 Ohio St. 49; *Hanford v. Fitch*, 41 Conn. 486; *Anding v. Davis*, 38 Miss. 574; *Hall v. Denckla*, 28 Ark. 506.

⁹⁴ See *Humphrey v. Hurd*, 29 Mich. 44; *Morrow v. Morgan*, 48 Tex. 304; *Mills v. Heaton*, 52 Iowa, 215.

⁹⁵ *Rannels v. Rannels*, 52 Mo. 108; *Nashville, etc. R. Co. v. Hammond*, 104 Ala. 191.

⁹⁶ See *Boykin v. Smith*, 65 Ala. 294; *Watson v. Tindal*, 24 Ga. 494; *Clarke v. McClure*, 10 Gratt. (Va.) 305.

title.⁹⁷ If followed by possession it is competent evidence to show the character of the occupancy, and that such possession is held under a claim of right,⁹⁸ and if the donee continues to remain in the enjoyment of the land for the statutory period of limitation the inefficacious gift will ripen into a title as strong as that acquired by any other form of grant.⁹⁹

The actual entry and possession of a donee under a parol gift manifests his intention to take as owner, and not as a tenant, and equally proves an admission on the part of the donor that the possession is so taken.¹ And even though it be conceded that the donor may recall his gift and reclaim the land because he has not conveyed his estate in the form provided by law, yet this does not indicate that his donee holds in subordination to his title, and until he does attempt to resume possession the donee may be regarded as the owner as to all the world, except the donor,² and even as to him the holding will be hostile and adverse.³

It is essential that the proof of a parol gift as the basis of an adverse possession must be clear and explicit, while the holding must plainly and unmistakably indicate its adverse character in order to work a transfer of title.⁴ It does not appear, however that the possession as against the donor, should be attended with any notoriety, neither is the donee bound to make a claim of right, nor is he required to proclaim the character of his possession until it shall have been denied by the donor.⁵

⁹⁷ *Studstill v. Wilcox*, 94 Ga. 690.

⁹⁸ *Sumner v. Stevens*, 6 Met. (Mass.) 337; *Stewart v. Duffy*, 116 Ill. 47; *Clark v. Gilbert*, 39 Conn. 98; *Schafer v. Hauser*, 111 Mich. 622.

⁹⁹ *Campbell v. Braden*, 96 Pa. St. 388; *Bartlett v. Secor*, 56 Wis. 520; *Pope v. Henry*, 24 Vt. 560; *Baldwin v. Temple*, 101 Cal. 396; *Wilson v. Campbell*, 119 Ind. 286; *Wheeler v. Laird*, 147 Mass. 421; *Lee v. Thompson*, 99 Ala. 95.

¹ *Sumner v. Stevens*, 6 Met. (Mass.) 337; *Rannels v. Ran-*

nels, 52 Mo. 108; *Clark v. Gilbert*, 39 Conn. 98; *Thompson v. Thompson*, 93 Ky. 435.

² *Rannels v. Rannels*, 52 Mo. 108; *Baldwin v. Temple*, 101 Cal. 396.

³ *Clark v. Gilbert*, 39 Conn. 98; *Davis v. Bowmar*, 55 Miss. 671; *Thompson v. Thompson*, 93 Ky. 435; *Pope v. Henry*, 24 Vt. 560; *Schafer v. Hauser*, 111 Mich. 622.

⁴ *Jordan v. Maney*, 10 Lea (Tenn.) 135; *Gifford v. Gifford*, 100 Mich. 258; *Duff v. Leary*, 146 Mass. 533.

⁵ *Clark v. Gilbert*, 39 Conn. 98.

The donor, in case of an absolute gift, must be presumed to have notice of the adverse claim of his donee; he knows that the possession is adverse and so intends, and hence, there is no occasion for notoriety.⁶ Admissions by the donor that he had given the land to the donee may always be shown, and, where equities may be shown in legal actions, all of the facts and circumstances which tend to establish the donee's right to retain and transmit possession are admissible in evidence in an action brought by the legal representatives of the donor against one in possession under title derived from the donee.⁷

§ 455. **Husband and wife.**—With respect to the legal ability of either husband or wife to originate and perfect an adverse holding of land of which they are in the joint occupancy, that shall be effectual against the other, the authorities are in substantial accord. It must be conceded that a possession, to be adverse, must not only be open, notorious, and continuous, but also exclusive. It must be such as to operate as an ouster or disseizin of any other person who may claim title or possessory rights, and be of such a character as to put the dispossessed person to his action or entry. This can never be the case where the legal owner is in possession, even though it may be joint, while two contemporaneous possessions of the same property, each adverse to the other, is a legal absurdity not conceivable.⁸ For these reasons when two persons are in possession of the same land, claiming by hostile rights, the law refers the possession to the party having the legal title. Hence, a husband cannot hold adversely to his wife, nor the wife adversely to the husband, lands of which they are in the joint occupancy.⁹ In the cases where this has been attempted the adverse claim has usually been based upon alleged parol gifts or verbal purchases, and while an interrupted possession by a donee under a parol gift, or by a vendee under a parol

⁶ *Thompson v. Thompson*, 93 Ky. 435.

⁷ *Studstill v. Wilcox*, 94 Ga. 690.

⁸ *Gafford v. Strauss*, 89 Ala. 283, 18 Am. St. 111.

⁹ *Reagle v. Reagle*, 179 Pa. 89; *Claughton v. Claughton*, 70 Miss.

384; *Hendricks v. Rasson*, 53 Mich. 575; *Bell v. Bell*, 37 Ala. 536; *Maudlin v. Cox*, 67 Cal. 387; *Vandervoort v. Gould*, 36 N. Y. 639; *Bader v. Dyer*, 106 Iowa, 715. But see *contra*, *Clark v. Gilbert*, 39 Conn. 94.

agreement to purchase, may, if accompanied by a claim of right, ripen into an indefeasible title, yet to have such effect the essential facts of an adverse holding must enter into and characterize the possession. The mere assertion of a hostile claim, and a possession which lacks the legal incidents of actual adverse occupancy, are insufficient.¹⁰ Where the spouses continue in the joint occupancy of lands there is no ouster or disseizin, either actual or constructive; the possession of either does not exclude or even encroach upon the possession of the other, nor is it antagonistic to their respective rights.¹¹

Not only is the rule well settled, that possession to be adverse must be exclusive, and hence, that two persons cannot hold the same land adversely to each other at the same time, but in the case of husband and wife we find an additional reason growing out of the common-law unity of the spouses. Yet, notwithstanding all this, it does not necessarily follow that either spouse may not originate and perfect an adverse holding.¹² In the event that either was invested with the legal title then the law will refer the joint occupancy to the right of such owner, and the rule above stated will apply. But, if neither had title then an adverse possession may be taken and held by either, and where the evidence is conflicting the question is for the jury to determine.¹³

Where the relation has ceased either may perfect a title against the other, as, if a wife claims title through a parol gift from the husband her open, notorious, hostile and continuous possession for the statutory period after the parties have been separated by divorce, will be sufficient to vest in her a title by adverse possession.¹⁴

§ 456. Parent and child.—There can be no doubt but what an adverse holding may, under some circumstances, be instituted by a parent against his child and that such holding

¹⁰ Gafford v. Strauss, 89 Ala. 283.

¹¹ Bell v. Bell, 37 Ala. 536; Hendricks v. Rasson, 53 Mich. 575; Boynton v. Miller, 144 Mo. 681.

¹² See Ward v. Nestell, 113 Mich. 185.

¹³ As where land is claimed by a widow and the heirs of her deceased husband. See Stiff v. Cobb, 126 Ala. 381, 28 So. Rep. 402, 85 Am. St. 38.

¹⁴ Ross v. McCain, 145 Mo. 271.

may develop into an unassailable title, notwithstanding the nearness and intimacy of the relation. Thus, where land is conveyed by deed from a parent to a child, but the parent continues in possession of the land, exercising acts of ownership over it and claiming it as his own, and such possession remains undisturbed for many years, the fact of open, notorious, hostile and uninterrupted occupation may be sufficient to show a holding adverse to the grantee, and, when continued beyond the period of disability, may effect a divesture of the title conveyed by the deed.¹⁵ At all events, it would seem that the character of the possession is a proper question for the jury and should be submitted to them.¹⁶

On the other hand, it has been held that the possession of land acquired by a father under a conveyance to his infant child can never be made the foundation of an adverse right, nor can such possession ever ripen into a prescriptive title in his favor.¹⁷ Even where a possession so taken is held for twenty years after the child has attained its majority, this circumstance, in itself, would be immaterial, for the father having entered, not in his own right, but in the right of another, his holding must be referred to his original entry. It is said, that where the doctrine of prescription is invoked in an action of ejectment, good faith is a primary element, and if one is in possession of land, which in good conscience he holds only as trustee for another, and he conceals the right of the true owner, inducing him to believe things which are not true in fact, and thereby causes the true owner to acquiesce in such possession, this is a fraud, and the law will never permit rights to be sacrificed in such a manner.¹⁸

The cases are not numerous with respect to this branch of the subject, but it may be stated, as a general proposition, that where parties sustain relations of paternity and filiation, the possession of land of the one by the other is presumed to be permissive, and not adverse; and to overcome such presump-

¹⁵ *Scarboro v. Scarboro*, 122 N. C. 234.

¹⁶ *Roberts v. Roberts*, 2 McCord (S. C.), 268.

¹⁷ *Parker v. Salmons*, 101 Ga. 160, 65 Am. St. 291; *Dodd v. McCraw*, 8 Ark. 83.

¹⁸ See *Parker v. Salmons*, 101 Ga. 160.

tion there must be an open assertion of hostile title, other than mere possession, and knowledge thereof must be brought home to the owner.¹⁹

§ 457. **Continued—Child vs. Parent.**—Questions arising out of adverse holdings by children against parents will probably be of rare occurrence as between the parties to the relation, but may often arise where adverse rights are asserted by a child against a third person who claims the land in virtue of some privity with the parent. The question will be more frequently presented where the child claims under a parol gift or an unrecorded deed. Where the child is of age he is not particularly distinguishable from other adverse claimants, but it seems that a presumption of gift may arise in favor of a child whose possession began during his minority, if before going into possession he had been emancipated by the parent. In the absence of manumission, however, the possession of a child is presumed to be that of the parent, and this presumption can be overcome only by clear proof of an actual surrender by the parent of all control over the land and a renunciation of claims thereto.²⁰

§ 458. **Dower rights.**—An interesting question is raised in a title asserted by adverse possession, with respect to the dower rights of the wife of the person prescribed against, he having been a married man at the time possession was taken and the full statutory period of limitation having elapsed prior to his decease. It is generally conceded that when a wife's right of dower has once attached to land the husband cannot defeat it by any act or omission on his part, and that neither his laches, default, covin or crime will be permitted to prejudice her rights.²¹ Such being the case, will an adverse possession by a disseizor, which ripens into a title against the husband in his lifetime, bar a claim for dower asserted by the wife upon his decease? There are cases which seem to answer this question in the affirmative,²² and such cases are not without

¹⁹ O'Boyle v. McHugh, 66 Mo. 588; Tibbetts v. Langley, 12 Minn. 390, 69 N. W. Rep. 37. S. C. 465.

²⁰ Holt v. Anderson, 98 Ga. 220. ²² See Winters v. De Turk, 133 Pa. St. 359; Keys v. Keys,

²¹ Williams v. Courtney, 77 58 Tenn. 425.

support in legal reason, but the weight of authority is in the negative.

The statute, as generally enacted, provides, in effect, that the limitation upon a right of action begins to run from the time when the cause thereof accrues, and the solution of our question must be sought in the construction that shall be given to these provisions. The decisions generally seem to hold that as the wife's right in her husband's land during his lifetime is contingent upon her survivorship, and gives her no right of disposition, entry, or possession independent of her husband, the statute of limitations does not begin to run against her until her interest has become mature by his death, and this has frequently been held to be the case even though a title by adverse possession has fully ripened as against him before his decease.²³ It has been intimated that where the wife's inchoate interest has been apparently extinguished or released, if she permits the record to remain in that condition without some action to cure it, the statute of limitations will run against her even in the husband's lifetime, but it is an altogether different proposition to say that when by the misfortune, neglect, or thriftlessness of the husband, a third party succeeds in acquiring title by adverse possession against him, the loss of the husband's ownership works an extinguishment of the wife's contingent interest.²⁴

An adverse possession cannot exist unless there is some one who can dispute the right claimed. A wife has neither title nor possession during her husband's lifetime, and the possession of a disseizor of the husband, not being inconsistent with her inchoate right, cannot be said to be in hostility to it, and therefore cannot be adverse.

§ 459. **Adverse claim by tenant.**—The general subject of landlord and tenant, and the respective relations which the parties sustain toward each other as well as to the subject matter

²³ *Steele v. Gellatly*, 41 Ill. 39; *Williams v. Williams*, 89 Ky. 381; *Wright v. Tichenor*, 104 Ind. 185; *Durham v. Angler*, 20 Me. 242; *Smith v. Wehrle*, 41 W. Va. 270; *Hart v. McCallum*, 28 Ga. 478. And see *Beall v. McMenemy*, 63 Neb. 70.

²⁴ *Lucas v. White*, 120 Iowa, 735, 95 N. W. Rep. 209, 98 Am. St. 380.

of the tenancy, has already been incidentally considered in other parts of this work, and, for this reason, it is not deemed wise or expedient to further discuss the general phases of the subject in this place or to recapitulate what has been said. It will be sufficient merely to restate the general rule, that a tenant cannot be heard to deny the title of his landlord when sued in ejectment, nor can he divest himself of the duties of the relation he has assumed without a complete surrender of the possession of the land.²⁵ It is a further general rule, that the mere possession of a tenant, however long continued, will not become adverse to his landlord nor operate to confer title upon himself.²⁶ But, while the potency of these general rules is beyond question, it does not follow that a tenant may not initiate and perfect an adverse holding, although in so doing he must cease to be a tenant in the proper meaning of that term.

The essence of a tenancy is a holding in subordination to the title of another. So long as this condition of subserviency exists the tenant is estopped from denying the title under which he entered. The possession having been acquired under this condition the estoppel continues until there has been a severance of the relation and a surrender of the possession. With respect to these general statements the courts are fairly agreed, whatever of divergency there may be arising through efforts of construction. It does not seem, however, that a literal surrender is what is meant, but rather a disclaimer of the landlord's title, for numerous authorities sustain the proposition that after the expiration of his term a tenant may, without any actual surrender, remain in possession and by asserting ownership in himself lay the foundation for an adverse title. When this repudiation of the former relation is properly brought to the knowledge of the landlord the statute of limitations at once begins to run, and if the possession is con-

²⁵ *Springs v. Schenck*, 99 N. C. 551, 6 S. E. Rep. 405; *Dasher v. Ellis*, 102 Ga. 830, 30 S. E. Rep. 544; *Butler v. Bertrand*, 97 Mich. 59, 56 N. W. Rep. 342; *Pettigrew v. Mills*, 36 Kan. 745, 14 Pac. Rep. 170; *Holman v. Bonner*, 63

Miss. 131; *Schields v. Hortack*, 49 Neb. 262; *Speldel v. Henrich*, 120 U. S. 377, 30 L. Ed. 718.

²⁶ *Johnson v. Butt*, 46 Neb. 220, 64 N. W. Rep. 691; *Hoffman v. Port Huron*, 102 Mich. 417.

tinued for the statutory period it ripens into a title.²⁷ But, to produce this effect, the disclaimer must be unequivocal and explicit, while the assertion of adverse right must be open and notorious, with express notice thereof to the landlord.²⁸

§ 460. Continued—Adverse claim before expiration of term.—As to whether a tenant may initiate an adverse possession before the expiration of his term, the authorities are not so clear, although legal reason no less than ancient precedent would seem to indicate that he cannot. Where the tenancy is not for a specific or definite period, as where the tenant holds at will, a mere disavowal of the landlord's title or any distinct notice given to the landlord that the tenant no longer holds under him, will determine the tenancy and work a practical disseizin.²⁹ The tenant then occupies much the same position as any other disseizor. But where the tenant holds for a definite term, or even from year to year, it has frequently been held that he cannot, during the term, rightfully disclaim the landlord's title or at his mere pleasure put an end to the contract.³⁰ Should he assume so to do it has been held in some instances that he may be proceeded against as a trespasser,³¹ but this is at the election of the landlord, who may still treat him as a tenant if he prefers,³² while some of the cases maintain that no action can be brought for the recovery of the land until the expiration of the term.³³ In many of the cases the doctrine is positively asserted that a tenant's possession while the term continues is never adverse to the title of

²⁷ Willson v. Watkins, 3 Pet. (U. S.) 43, 7 L. Ed. 596, is generally cited as a leading case on this point. And see Wells v. Sheerer, 78 Ala. 142; Wilkins v. Pensacola, 36 Fla. 36, 18 So. Rep. 20; Greino v. Munson, 9 Vt. 37.

²⁸ Ponder v. Cheeves, 104 Ala. 307, 16 So. Rep. 145; Wilkins v. Pensacola, 36 Fla. 36, 18 So. Rep. 20; Smith v. Hitchcock, 38 Neb. 104, 56 N. W. Rep. 791; Nessley v. Ladd, 29 Oreg. 345, 45 Pac. Rep. 904; Udell v. Peak, 70 Tex. 547, 7 S. W. Rep. 786.

²⁹ Ripley v. Yale, 19 Vt. 156; Jones v. Pelham, 84 Ala. 208, 4 So. Rep. 22; Smith v. Hitchcock, 38 Neb. 104, 56 N. W. Rep. 791.

³⁰ Chambers v. Pleak, 6 Dana (Ky.), 426; Wilkins v. Pensacola, 36 Fla. 36, 18 So. Rep. 20; De Lancey v. Ganong, 9 N. Y. 9.

³¹ Fusselman v. Worthington, 14 Ill. 135.

³² Duke v. Harper, 6 Yerg. (Tenn.) 280.

³³ De Lancey v. Ganong, 9 N. Y. 9; Sutton v. Casselleggi, 5 Mo. App. 111.

the lessor, unless made so by some act of disseizin to which the lessor assents,³⁴ and that a tenant cannot, during the term, originate a hostile or adverse possession,³⁵ nor continue an adverse possession commenced prior to the lease.³⁶

§ 461. **Tenant holding over.**—As a general rule the mere holding over by a tenant after the expiration of his term is not evidence of an adverse possession, and he will be deemed a tenant at will of the landlord, and this, notwithstanding he refuses to take a new lease, to pay rent, or to surrender possession.³⁷ But if such holding over shall be accompanied by open and notorious acts of renunciation of the landlord's title, or if the tenant by some unequivocal act notifies the landlord that he no longer holds possession by virtue of his entry under the lease but claims adversely, and it appears that the landlord is apprised of such acts of disclaimer, an adverse possession may be inaugurated and if possession, under such circumstances, is continued for the statutory period it will be deemed adverse.³⁸

§ 462. **Adverse entry under deed from tenant.**—Not only is a tenant estopped to deny his landlord's title so long as he holds under same, but all who enter under his possession are bound by the same estoppel. When, therefore, a person enters upon land either by the suffrance, permission, or deed of the tenant of another, he will be charged with all the duties which the tenant himself owes to his lessor, and will be allowed to assume no relation in hostility to the title under which his possession was acquired.³⁹ If he obtains possession by collusive concert with the tenant, he at once becomes identified with him, stands for all practical purposes in his place, and is subject to the same disabilities.⁴⁰

³⁴ *Sutton v. Casselleggi*, 5 Mo. App. 111.

³⁵ *Whiting v. Edmunds*, 94 N. Y. 309; *Hoffman v. Port Huron*, 102 Mich. 417.

³⁶ *Corning v. Troy Iron Factory*, 34 Barb. (N. Y.) 485.

³⁷ *Vance v. Johnson*, 10 Humph. (Tenn.) 214; *Campbell v. Shipley*, 41 Md. 81; *Leport v. Todd*, 32 N. J. L. 124; *Emerick v. Traverer*, 9 Gratt. (Va.) 220. And see *Schields v. Horbach*, 49 Neb. 262, 68 N. W. Rep. 524;

Meridan Land Co. v. Ball, 63 Miss. 125, 8 So. Rep. 316.

³⁸ *Schields v. Horbach*, 49 Neb. 262, 68 N. W. Rep. 524; *Morton v. Lawson*, 1 B. Mon. (Ky.) 45; *Ponder v. Cheaves*, 104 Ala. 307.

³⁹ *Melvin v. Waddell*, 75 N. C. 361; *Jackson v. Houser*, 7 Cow. (N. Y.) 323; *Dikeman v. Parish*, 6 Pa. St. 210; *Bannon v. Brandon*, 34 Pa. St. 263.

⁴⁰ *Springs v. Schenck*, 99 N. C. 551.

IV. THE STATE AND ITS AGENCIES.

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| § 463. Adverse rights against the sovereign — The United States.
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§ 463. Adverse rights against the sovereign—The United States.—It is a general rule of universal observance, except as hereinafter indicated, that statutes of limitation do not run against the sovereign. That no laches can be imputed to the king, and that no time can bar his rights, is the maxim of the common law, founded upon the principle of public policy, that, as he is occupied with the cares of government he should not be permitted to suffer from the negligence of his officers and servants. The principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public. In the jurisprudence of the Federal government this principle has always been maintained, and, as against the United States, title to land can never be acquired by adverse possession.⁴¹ There is no way for title to land to be divested out of the United States except in strict pursuance of some law enacted for such purpose, and mere occupancy and possession, however long continued, will never work a disseizin or ripen into a title.⁴² So long as the title to land remains in the United States, adverse possession cannot exist either in favor of or against anyone.⁴³

⁴¹ *Gibson v. Chouteau*, 13 Wall. (U. S.) 92; *Lindsey v. Miller*, 6 Pet. (U. S.) 666; *Oaksmith v. Johnston*, 92 U. S. 343; *Sparks v. Pierce*, 115 U. S. 408; *Redfield v. Parks*, 132 U. S. 239; *Knight v. Leary*, 54 Wis. 459; *Stringfellow v. Railroad Co.*, 117 Ala. 250.

⁴² *Drew v. Valentine*, 18 Fed. Rep. 712; *Shepley v. Cowan*, 52 Mo. 559; *Doran v. Railroad Co.*, 24 Cal. 246; *Knight v. Leary*, 54 Wis. 459; *Twining v. Burlington*, 68 Iowa, 284; *Cook v. Foster*, 7 Ill. 652.

⁴³ *Stephens v. Moore*, 116 Ala. 397; *Smith v. McCorkle*, 105 Mo.

§ 464. Continued—Grantees of the United States.—As adverse possession cannot run against the United States, it logically follows that a claim of title founded upon a possession instituted prior to the issuance of a patent cannot be asserted against a grantee of the United States, and mere possession of government lands, though open, exclusive and uninterrupted for twenty years, creates no impediment to its recovery by the government, or by one who within that period receives a conveyance from the government.⁴⁴

But while it is true that mere lapse of time and continuance of possession without pretense of title, or under pretense of a void title, cannot be set up against the government, yet long and undisturbed possession is nevertheless a strong weapon of defense in the hands of one who can show reasonable proof that the title of the government has been parted with and has devolved on the possessor,⁴⁵ while in some states the doctrine of relation has been so extended as to permit the statute of limitations to operate against a grantee of the government from the time he becomes entitled to a patent and irrespective of the time of its actual issue.⁴⁶

It would seem, however, that the last mentioned rule, whatever may be its effect in states where it is recognized, does not state the true principle of law and that it is in direct conflict with the decisions of the Federal courts.⁴⁷ It has always been the policy of the government that until a patent has issued no adverse rights can run either in favor of or against anyone,

135; *Whitney v. Gunderson*, 31 Wis. 359; *Anzar v. Miller*, 90 Cal. 342.

⁴⁴ *Redfield v. Parks*, 132 U. S. 239; *Gardiner v. Miller*, 47 Cal. 570; *Treadway v. Wilder*, 12 Nev. 108; *Smith v. McCorkle*, 105 Mo. 135; *Stephens v. Moore*, 116 Ala. 397; *Oaksmith v. Johnson*, 92 U. S. 343; *Steele v. Boley*, 7 Utah, 64; *Stephens v. Moore*, 116 Ala. 397.

⁴⁵ So held where a patent had been issued to one, of lands then in the possession of another, who

claimed same by virtue of a section by the state in lieu of section 16, but to prove which no primary evidence could be adduced. See *Hedrick v. Hughes*, 15 Wall. (U. S.) 123.

⁴⁶ See *Dolen v. Black*, 48 Neb. 688; *Cady v. Elghmey*, 54 Iowa. 615; *Gay v. Ellis*, 33 La. Ann. 249; *Doe v. Hearick*, 14 Ind. 242. And consult *Wirth v. Branson*, 98 U. S. 118; *Defferback v. Hawke*, 115 U. S. 405.

⁴⁷ See *Redfield v. Parks*, 132 U. S. 239.

and this is also the rule observed in most of the states.⁴⁸ In the Federal courts it has repeatedly been affirmed that the patent is the instrument whereby the title of the government passes. In other words, it is the conveyance of the United States. If other parties possess equities superior to those of the patentee, a court of equity may, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or may cancel the patent, but in an action of ejectment in the Federal courts the legal title must always prevail, and the patent, when regular on its face, is conclusive evidence of that title.⁴⁹

§ 465. *The state.*—The common-law principle of protection to the crown, under which no adverse rights are permitted to be asserted against the Federal government, applies with equal force to the states. It is upon this principle that the statutes of a state prescribing periods within which rights must be prosecuted are held not to embrace the state itself,⁵⁰ unless it is expressly included,⁵¹ or the mischiefs to be remedied are of such a nature that it must necessarily be included. As legislation of a state can only apply to persons and things over which the state has jurisdiction, it logically follows that the United States are also excluded from the operation of such statutes.⁵²

But a state may submit itself to the operation of the statute, in which event the same rule as to ouster and possession will obtain where the state is the owner as would in the case of private individuals,⁵³ and an adverse holding for the statutory

⁴⁸ *Stephens v. Moore*, 116 Ala. 397; *Gardiner v. Miller*, 47 Cal. 570; *Treadway v. Wilder*, 12 Nev. 108; *Smith v. McCorkle*, 105 Mo. 135; *Steele v. Boley*, 7 Utah, 64.

⁴⁹ *Redfield v. Parks*, 132 U. S. 239; *Gibson v. Chouteau*, 13 Wall. (U. S.) 102.

⁵⁰ *Gardiner v. Miller*, 47 Cal. 570; *Carey v. Whitney*, 48 Me. 516; *Frontman v. May*, 33 Pa. St. 455; *Hurst v. Dulany*, 84 Va. 701; *Glaze v. Railroad Co.*,

67 Ga. 761; *Swann v. Gaston*, 87 Ala. 569; *Des Moines v. Harker*, 34 Ind. 84.

⁵¹ See *Schneider v. Hutchinson*, 35 Oreg. 253, 76 Am. St. 474; *St. Paul v. Chicago, etc. Ry. Co.*, 45 Minn. 396.

⁵² *United States v. Hoar*, 2 Mason (C. Ct.), 312; *People v. Gilbert*, 18 Johns, (N. Y.) 228.

⁵³ It has been held that under the law of Vermont a title against the state may be acquired by long continued ad-

period will bar an action by the state in the same manner as though the land had been in the seizin of a citizen.⁵⁴ In a number of states this has been done, and in such states it would seem that so far as their rights in land are concerned the "sovereign" and the "subject" stand upon an equal footing. Yet even in states where the statute has been extended to include actions brought in the name of the people, a distinction has been preserved between lands held by an original title in virtue of sovereignty, and lands held by a derivative title and in a proprietary capacity the same as an individual. With respect to the latter it is always held that an adverse possession may be inaugurated that time may ripen into title,⁵⁵ the theory being that the state acquires, holds, and conveys such lands the same as a citizen and that, with respect to purely proprietary rights, it is not to be distinguished from him. With respect to the former the common-law idea is, to some extent, retained. The sovereign rights of the people, it is contended, being incapable of alienation or surrender, except as indicated by themselves in the constitution, it follows that property held in such right cannot be appropriated by the citizen, and while it is competent for the legislature to provide for its regulation it is beyond the power of that body to provide for its loss by the state and its acquisition by the individual through prescriptive user.⁵⁶ As the lands owned by the state in virtue of its sovereignty are very limited, consisting mainly of submerged tracts, this distinction becomes of small importance except in states bordering on the sea or the great lakes, and in several jurisdictions courts have refused to recognize it.⁵⁷

verse possession, notwithstanding a provision of the statute excepting from its operation lands belonging to the state. See *Holbrook v. Bowman*, 62 N. H. 313.

⁵⁴ See *Schneider v. Hutchinson*, 35 Oreg. 253, 76 Am. St. 474; *Nichols v. Boston*, 98 Mass. 39; *St. Paul v. Chicago*, etc. Ry. Co., 45 Minn. 396; *Green v. Irving*, 54 Miss. 450; *Wyatt v. Tisdale*, 97 Ala. 594; *Price v. Jackson*, 91 N. C. 14.

⁵⁵ *People v. Trinity Church*, 22 N. Y. 44; *Nichols v. Boston*, 98 Mass. 39; *Burch v. Winston*, 57 Mo. 62; *Price v. Jackson*, 91 N. C. 14; *Wyatt v. Tisdale*, 97 Ala. 594.

⁵⁶ *Stims v. Frankfort*, 79 Ind. 446; *Ralston v. Weston*, 46 W. Va. 554; *Sollers v. Sollers*, 77 Md. 148, 39 Am. St. 404.

⁵⁷ See *Schneider v. Hutchinson*, 35 Oreg. 253, 76 Am. St. 474;

But while it is not competent, as a general rule, to prescribe against the state it does not follow that the state may not prescribe against the citizen. In this latter respect it seems the state is entitled to every right accorded to a citizen, and long and uninterrupted possession of land by the state, with a claim of ownership for public use, will raise a presumption of grant or dedication by the former owner.⁵⁸ So, too, where an agent is treated as a principal he may rely upon the protection of the statute of limitations. This rule may be applied where officers or agents of the state or of the United States, are sued in ejectment by a citizen to recover lands of which they are in ostensible possession but which, in fact, belong to the government. In such event, the defense of adverse possession may be interposed and if defendants can show requisite title in themselves through an adverse holding, although in fact for the government, a valid defense will be made out.⁵⁹

§ 466. **Municipalities.**—It would seem, upon principle and analogy, that the same rule which exempts the sovereign power from the operation of the statute of limitations should also apply to all or any of its municipal agencies. It is clear that the statute never was intended as a bar to the assertion of public rights and all of the reasons which sustain the right of the state against the encroachments or invasions of the individual are equally as cogent in the case of counties, cities, towns, or other municipal sub-divisions, which are, in fact as well as in law, the organs by which the state performs the larger portion of its functions. A well considered line of authorities sustain these views, and numerous decisions have reaffirmed the doctrine that the title of a municipal corporation to land, employed for uses that are conducive to the enjoyment and convenience of the public, is paramount and exclusive, and that no private occupancy, for whatever time continued, whether adverse or permissive, can vest a title inconsistent with it.⁶⁰ Thus, the mere adverse possession, for the

St. Paul v. Chicago, etc. Ry. Co.,
45 Minn. 396.

⁵⁸ Smith v. Cornelius, 41 W.
Va. 59; Oak Dale Dist. v. Fagen,
94 Iowa, 676.

⁵⁹ Stanley v. Schwalby, 147
U. S. 508.

⁶⁰ Brown v. Carthage, 128 Mo.
10; Burbank v. Fay, 65 N. Y.
57; Philadelphia v. Railroad Co.,

statutory period, of a street or alley which is a public highway, cannot operate to confer title,⁶¹ nor will the rights of the public in such a street be lost by acquiescence in its obstruction or private use by a citizen, or by laches in resorting to legal remedies.⁶²

There can be no question but that such rule is both salutary and just and that its maintenance is essential to the preservation of public interests and property rights held in trust for the people. The distinction between the sovereign and the citizen, whatever it may have been at common law, is lost in the United States, or, if preserved at all, is more fanciful than real. Cities, villages, counties, towns and taxing districts are only municipal agencies of the state, and have no existence apart from it. If we admit that immunity applies to the sovereign power it is difficult to perceive why municipal corporations, or other local authorities established to manage the affairs of the political sub-divisions of the state, should not also enjoy such immunity. Where property is dedicated to public uses or condemned for such uses in pursuance of the power of eminent domain, the state is the beneficiary; the use of public places is a sovereign right, and, if this be so, such right cannot be impaired by individual encroachment.⁶³

§ 467. Continued—Theory of municipal ownership.—There is another reason for the assertion and maintenance of

58 Pa. St. 253; Commonwealth v. Moorhead, 118 Pa. St. 344; Taylor v. Commonwealth, 29 Gratt. (Va.) 780; Yates v. Warrenton, 84 Va. 377; Crass v. Morristown, 18 N. J. Eq. 305; State v. Trenton, 36 N. J. L. 198; Hoadly v. San Francisco, 50 Cal. 265; Cohn v. Parcels, 72 Cal. 367; Sims v. Chattanooga, 2 Lea (Tenn.) 694; Henshaw v. Hunting, 1 Gray (Mass.) 203; Simmons v. Cornell, 1 R. I. 519; Ralston v. Weston, 46 W. Va. 544, 76 Am. St. 834, 33 S. E. Rep. 326; Lee v. Harris, 206 Ill. 428.

⁶¹ Crocker v. Collins, 37 S. C. 327; Wolfe v. Sullivan, 133 Ind.

331; Depriest v. Jones (Va., no off. rep.), 21 S. E. Rep. 478.

⁶² Webb v. Demopolis, 95 Ala. 116; St. Louis v. Railroad Co., 114 Mo. 13.

⁶³ See Webb v. Demopolis, 95 Ala. 116; Sullivan v. Tichenor, 197 Ill. 97; Childs v. Nelson, 69 Wis. 125; Driggs v. Phillips, 103 N. Y. 77; Schmidt v. Draper, 137 Ind. 249; Moorse v. Carson, 104 N. C. 431; Williams v. St. Louis, 120 Mo. 403; Yates v. Warrenton, 84 Va. 337; Price v. Plainfield, 40 N. J. L. 608; Heddleston v. Hendricks, 52 Ohio St. 460; Almy v. Church, 18 R. I. 182; Nicolai v. Davis, 91 Wis. 370.

this rule, growing out of the fundamental theory of adverse possession. It is an underlying doctrine of prescriptive titles that the adverse occupancy originated lawfully, but, by reason of the loss of the muniments during the long flow of time, the fact has become incapable of proof. Now, in the case of public streets, parks, commons, or grounds of a similar character, the municipal government acquires and retains a right of entry only as agent of the general public and clothed with the trust and duty of protecting and conserving same for the public use. As the municipality can neither convey the title nor relieve itself of the trust, it necessarily follows that individuals are virtually precluded from acquiring it, and since the land is thus incapable of alienation no prescriptive right can be predicated upon a possession of same, for the prescription, to be effective, much presuppose a title fairly acquired in the first instance. If we shall concede this reasoning to be correct, then, as to all such lands, private encroachments or invasions can never rise beyond the dignity of a trespass and, however long continued, can never ripen into a prescriptive title. This doctrine is sustained by a large and well considered line of decisions.⁶⁴

§ 468. Continued—Effect of estoppel.—In some instances the doctrine, as just stated, has been modified to meet the exigencies of particular cases, and the courts, while maintaining the integrity of the general rule, have permitted the operation of an equitable estoppel against the public when the ends of justice seemed to require its assertion.⁶⁵ It has been

⁶⁴ See cases last cited, and *Visalia v. Jacobs*, 65 Cal. 434; *Cheek v. Aurora*, 92 Ind. 107; *Thibodeau v. Maggioni*, 4 La. Ann. 73; *Simmons v. Cornell*, 1 R. I. 519; *Webb v. Butler County*, 52 Kan. 375; *De Kalb v. Luney*, 193 Ill. 185.

⁶⁵ As, if such appearances are created by non-user that acts done by an adjoining proprietor would indicate that he is in good faith claiming as his own that which in fact is a part of a highway, and is expending money on

the faith of his claim by adjusting his property to the highway as he supposes or claims it to be, it has been held that the public will be estopped. *Hamilton v. State*, 106 Ind. 361. And see *Brooks v. Riding*, 46 Ind. 15; *Logan Co. v. Lincoln*, 81 Ill. 156; *Jordan v. Chenoa*, 166 Ill. 530; *Davies v. Huebner*, 45 Iowa, 547; *Uptagraft v. Smith*, 106 Iowa, 385; *Vicksburg v. Marshall*, 59 Miss. 563; *Sims v. Chattanooga*, 2 Lea (Tenn.), 694.

urged as an objection to this course that it is a confounding of the rights of the people with the rights of the municipality, and that an equitable estoppel can no more deprive the sovereign of his rights than can the legal estoppel of limitation." While this argument certainly seems sound, and is in consonance with all of the received ideas concerning sovereignty, the tendency seems to be to permit the principle of estoppel *pais* to apply in those cases where individuals have for years been in the open and undisputed possession of municipal land, and when to deprive them of such possession would work apparent injustice.⁶⁷ Thus, where the possession of a street has been allowed to remain in a private person, and the latter, acting under the belief that the street had been permanently abandoned by the city, has erected buildings or made such valuable improvements that to permit the city to regain possession would cause him great pecuniary loss, the city may be held estopped to assert its rights.⁶⁸ But mere nonuser of a public way, however long continued, does not, by virtue of the statute of limitations, bar the right of the public to be restored to possession.

§ 469. Continued—Conflicting views.—The rule announced in the preceding paragraphs is by no means uniform, however, and is opposed by a formidable array of decisions holding to the exact contrary. Under these authorities the doctrine of the inviolability of municipal titles is expressly denied and the rights and duties of the municipality placed upon the same plane as those of the individual.⁶⁹ It is asserted by this line of decisions that a municipal corporation, or other artificial body endowed with corporate rights and exercising public functions, is entitled to no higher consideration than a natural person; that where possession is taken of public ground and continuously held for the statutory period, it will be suf-

⁶⁶ *Ralston v. Weston*, 46 W. Va. 544.

⁶⁷ *Orr v. O'Brien*, 77 Iowa, 253, 14 Am. St. 277; *Lee v. Mound Station*, 118 Ill. 304; *Sullivan v. Tichenor*, 179 Ill. 97; *Simplot v. Railway Co.*, 16 Fed. Rep. 350. And see *Dillon, Mun. Corp.* 675.

⁶⁸ *Lee v. Harris*, 206 Ill. 423, 69 N. E. Rep. 230, 99 Am. St. 176; *De Kalb v. Luney*, 193 Ill. 185, 61 N. E. Rep. 1036.

⁶⁹ *Flynn v. Detroit*, 93 Mich. 590; *Teass v. St. Albans*, 38 W. Va. 1.

ficient to vest in the occupant the same title that a similar prescription would have raised in the case of private persons.⁷⁰

In support of this doctrine it is contended, that a municipal corporation is held to the same degree of diligence in guarding its streets and public places from encroachments as natural persons are required to exercise in protecting their property from the adverse possession of others; that the reasons which apply to the sovereign, and which preserve the sovereign's rights intact and prevent them from being impaired or lost by the neglect of the officers of state, do not apply to a city or town; that the latter, being compact communities, have special officers whose duty it is to see that the public places are kept free from encroachments, and that if the authorities permit an individual to encroach upon the public ownership and to hold and occupy public places, under a claim of right, for the statutory period of limitation, without interruption or disturbance, the occupant will thereby become clothed with a complete title. Further, that the title thus perfected by time will be just as available against the municipality as it would be against any other person whose elder title and right of entry may be barred by a continued adverse possession.⁷¹

A distinction is made in some of the cases between property held for public uses or upon public trusts, and property held in what is substantially a private capacity. With respect to the former the statute is held not to apply,⁷² but where the land is held in the same manner as the lands of a private proprietor and is subject to sale or other disposition, then the statute will run against the municipality in favor of an adverse holder for the prescribed limitation period.⁷³ Much of the confusion

⁷⁰ *Vier v. Detroit*, 111 Mich. 646; *Darrow v. Homer*, 122 Mich. 229; *Fort Smith v. McKebbin*, 41 Ark. 45; *Dudley v. Frankfort*, 51 Ky. 610; *St. Paul Ry. Co. v. Minneapolis*, 45 Minn. 400; *Ostrom v. San Antonio*, 77 Tex. 345; *Meyer v. Lincoln*, 33 Neb. 566. But compare *Krueger v. Jenkins*, 59 Neb. 641. And see, also, *Pella v. Schotte*, 24 Iowa, 283; *Webber v. Chapman*,

42 N. H. 326; *Peoria v. Johnston*, 56 Ill. 45.

⁷¹ *Wheeling v. Campbell*, 12 W. Va. 36; *Dudley v. Frankfort*, 12 B. Mon. (Ky.) 610; *Flynn v. Detroit*, 93 Mich. 590; *Vincent v. Kalamazoo*, 111 Mich. 230.

⁷² *Ralston v. Weston*, 46 W. Va. 544; *Bedford v. Willard*, 133 Ind. 562.

⁷³ *Bedford v. Willard*, 133 Ind. 562; *Hammond v. Shepard*, 186

which seems to attend the subject grows out of this distinction.

It will thus be seen that there are two strongly defined rules leading to diametrically opposed results, with a middle ground in the nature of a compromise, and, for this reason, the writer can do no more than point out the inconsistency which exists in this, as in many other departments of the common law of our country, and refer the practitioner to the decisions of his own state, if happily such there are, whenever the question shall confront him for solution. About all that can be said is, that the rule first stated seems to be founded in legal reason and is sustained by the volume of authority. The distinction above noted seems to have obtained a general adherence and where the question has been presented the authorities seem to be in substantial accord.

§ 470. **Adverse claims by the municipality.**—However conflicting the views may be with respect to the acquisition and assertion of adverse rights against the municipality, there would yet seem to be a substantial accord in the opinions respecting the right of the municipality to acquire title by adverse possession and to prescribe against the citizen. The open, public and notorious use by a town or city of land used for a public purpose, and the actual, continuous and exclusive possession of such land for the limitation period, will generally be sufficient to vest title in the municipality.⁷⁴

§ 471. **Quasi-public corporations.**—It has been held that lands owned or controlled by corporations engaged in works of public utility should be regarded much in the same light as lands owned by a municipal corporation which are devoted to public uses. This, it is said, is particularly true of the rights of way of railroads, or other avenues of public travel, and that as to such lands no title can be acquired by adverse possession.⁷⁵ In support of this it is urged that a railway cor-

Ill. 235; *Evans v. Erie Co.*, 66 Pa. St. 222; *Powers v. Council Bluffs*, 45 Iowa, 652; *Chicago v. Middlebrooke*, 143 Ill. 265.

⁷⁴ *Quindaro Tp. v. Squier*, 51 Fed. Rep. 152.

⁷⁵ *Southern Pac. Ry. Co. v. Hyatt*, 132 Cal. 240, 64 Pac. Rep. 272; *Collett v. Vanderburgh*, 119 Ind. 27, 21 N. E. Rep. 329; *Northern Pac. Ry. Co. v. Smith*, 171 U. S. 260.

poration owing duties to the public in the exercise of its corporate functions, cannot, by voluntary conveyance, part with any of its property necessary for a proper discharge of those duties, and that, being without power to convey, it logically follows that no prescription can be had against it for land impressed with this character. The contention rests on the claim that a right of way is land devoted to a public use, and therefore is not distinguishable from any other highway.

The volume of authority, however, is directly opposed to the views just stated, and numerous decisions affirm the doctrine that a railway company may be deprived of its right of way, or parts thereof, by an adverse occupation for the statutory period.⁷⁶ It is further held, that in such event it is immaterial whether the title of the company is in fee, either qualified or absolute, or whether it holds but a mere easement, for, whichever it may be, the right conferred is a possessory one and sufficient to sustain an action of ejectment.⁷⁷ Nor is it material, under this line of decisions, whether the statute under which the adverse occupant claims is regarded as one indulging in the presumption of a grant from the true owner or is simply a statute of repose.⁷⁸

These decisions also distinguish between a highway and a railway, and while conceding that a railway company owes certain duties to the public, and is entitled to a certain protection for the better performance of such duties, yet maintain that a railroad is not a public highway in the sense that it belongs to the people. Although the company is engaged in a work of public utility it nevertheless holds its property in a private capacity for the profit of its stockholders. In order to efficiently perform its duties to the public as a common carrier it is permitted to take land by compulsory process

⁷⁶ *Pittsburgh, etc. Ry. Co. v. Stickley*, 155 Ind. 312; *Matthews v. Railway Co.*, 110 Mich. 170; *Littlefield v. Railroad Co.*, 146 Mass. 268; *Illinois, etc. R. R. Co. v. Wakefield*, 173 Ill. 564; *Pollock v. Railroad Co.*, 103 Ky. 84; *Wilmot v. Railroad Co.*, 76 Miss. 374; *Northern Pac. Ry. Co. v. Townsend*, 84 Minn. 152, 87 Am. St. 342, 86 N. W. Rep. 1007.

⁷⁷ *Northern Pac. Ry. Co. v. Townsend*, 84 Minn. 152.

⁷⁸ *Northern Pac. Ry. Co. v. Townsend*, 84 Minn. 152; *Northern Pac. Ry. Co. v. Ely*, 25 Wash. 384.

and the public are forbidden to interfere with the company's exclusive use thereof. But, it is said, the right to such exclusive use must be actively asserted, and if, through the laches and neglect of the company, a party has entered upon and continuously occupied a portion of the right of way in a manner inconsistent with its use as such, the statute of limitations may be invoked to protect such occupancy with the same effect as in any other case of adverse possession.⁷⁹

In a few decisions a middle ground is taken and an attempt is made to differentiate between a hostile possession and a possession consistent with, or in subordination to, the rights of the railway company. Thus, it is held that inasmuch as the right of way of a carrier is but a mere easement for a special purpose, therefore one who takes and holds possession of lands subject to the easement cannot acquire prescriptive title as against the railroad, so long as the purposes for which he uses them are not inconsistent with the right of way, and that such possession cannot become adverse until the railroad needs the land so possessed for railroad purposes.⁸⁰ It is further contended, that one who enters upon and improves the right of way of a railroad does so at his peril, no matter what paper title he may have from a third person, and that all persons are affected with notice of the extent of the right of way when it depends upon charter provisions. The volume of authority, however, is opposed to the views last presented and the more generally accepted doctrine would seem to be, that where a person enters and occupies a railroad right of way, as where he encloses it with his adjoining lands, and thereafter continuously uses it without the consent of the company, asserting a claim of ownership inconsistent with the company's rights, he thereby has such an occupancy as will ripen into title by adverse possession upon the expiration of the statutory period, and this too, notwithstanding he has a right during such period to use the right of way for any purpose not required by the railroad.⁸¹

⁷⁹ *Pittsburgh, etc. Ry. Co. v. Stickley*, 155 Ind. 312; *Northern Pac. Ry. Co. v. Ely*, 25 Wash. 384.

⁸⁰ *Railroad v. French*, 100 Tenn. 209.

⁸¹ *Matthews v. Railroad Co.* 110 Mich. 170, 64 Am. St. 336;

CHAPTER XIII.

VERDICT AND JUDGMENT.

- I. VERDICT OR FINDINGS.
- II. JUDGMENT.

I. VERDICT OR FINDINGS.

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| § 472. Generally considered. | § 475. Defects and invalidities. |
| 473. Form of verdict. | 476. Directing verdict. |
| 474. Sufficiency. | 477. Finding by the court. |

§ 472. Generally considered.—The issues in ejectment are determined, as in other common-law actions, by the verdict of the jury to whom they are submitted, and, as the stability of the judgment rendered in the suit is dependent upon the sufficiency and correctness of the verdict, this becomes a matter of prime importance. The general rule with respect to verdicts is, that they shall be reasonably construed in the light of the proceedings, and not be regarded as mere abstractions. Every reasonable presumption should be made in their favor, and they should never be rejected or set aside, except in cases of absolute necessity.⁸² If the verdict responds to the issue, and is sufficiently certain to serve as the basis of a judgment to which the party in whose favor it is rendered is clearly entitled, or can be made certain by reference to the pleadings or some other received standard, it will generally be permitted to stand.⁸³ It is essential, however, that the verdict should be direct and unequivocal. It must be either for the plaintiff or the defendant, and it cannot impose conditions,⁸⁴ but it will not

Illinois, etc. *R. R. Co. v. Houghton*, 126 Ill. 233.

⁸² *Wilson v. McCrillies*, 50 Mich. 347; *Chambers v. Butcher*, 82 Ind. 508; *Lourance v. Goodwin*, 170 Ill. 393.

⁸³ *Hutchinson v. County Court*, 61 Cal. 119;; *Minkhart v. Hankler*, 19 Ill. 47.

⁸⁴ *Broach v. Kelly*, 71 Ga. 698; *Eberts v. Thompson*, 113 Pa. 19.

be vitiated merely by matter intended to be explanatory,⁸⁵ nor by immaterial findings,⁸⁶ nor by slight variance from the pleadings,⁸⁷ nor for mere informality,⁸⁸ provided it is still responsive to the issue,⁸⁹ and no substantial rights of either party are affected.⁹⁰

It is further essential, that the verdict should possess the elements of certainty as prescribed by statute. Thus, if the statute requires the jury to find the estate proved by the plaintiff and the verdict fails to specify any estate, no judgment can be rendered on it.⁹¹ This is true even where the court is authorized to reduce a verdict to proper form, as the defect, in the case mentioned, is matter of substance and should the court attempt to supply the want of a substantial finding it would encroach upon the province of the jury.

§ 473. **Form of verdict.**—At a comparatively early period in the development of the action in this country the form of the verdict became fixed by statute, and all of the modern codes seem to have adopted, either in letter or substance, the phrasing of these early statutes. In this respect, therefore, there is a remarkable uniformity in all of the states. The general provision of the statute is, that in the following cases the verdict shall be rendered as hereinafter stated.

First—If it be shown on the trial that all the plaintiffs have a right to recover the possession of the premises, the verdict in that respect shall be for the plaintiffs generally.

Second—If it appear that one or more of the plaintiffs have a right to the possession of the premises, and that one or more have not such right, the verdict shall specify for which plaintiff the jury finds, and as to which plaintiff they find for the defendant.

Third—If the verdict be for any plaintiff, and there be several defendants, the verdict shall be rendered against such of

⁸⁵ *Lemmon v. Hartsook*, 80 Mo. 13.

⁸⁶ *Baum Iron Co. v. Bank*, 50 Neb. 387; *Bartley v. Bingham*, 34 Fla. 19.

⁸⁷ *Bartley v. Bingham*, 34 Fla. 19.

⁸⁸ *Thompson v. Brannan*, 76 Cal. 618; *Hawley v. Twyman*, 24 Gratt. (Va.) 516.

⁸⁹ *Knight v. Roche*, 56 Cal. 15; *Goodhue v. Baker*, 22 Ill. 262.

⁹⁰ *Allard v. Lamirande*, 29 Wis. 502.

⁹¹ *Long v. Linn*, 71 Ill. 152.

them as were in possession of the premises or as claimed title thereto at the commencement of the action.

Fourth—If the verdict be for all the premises claimed, as specified in the declaration, it shall, in that respect, be for such premises generally.

Fifth—If the verdict be for a part of the premises described in such declaration, the verdict shall particularly specify such part, as the same shall have been proved, with the same certainty hereinbefore required in the description of the premises claimed.

Sixth—If the verdict be for an undivided share or interest in the premises claimed, it shall specify such share or interest; and if for an undivided share in a part of the premises claimed it shall specify such share, and shall describe such part of the premises as hereinbefore required.

Seventh—The verdict shall also specify the estate which shall have been established on the trial, by the plaintiff in whose favor it shall be rendered, whether such estate be in fee or for his own life or for the life of another, stating such lives, or whether it be for a term of years and specifying the duration of such term.

§ 474. Sufficiency.—While it is true that verdicts should always receive a liberal construction and should never be avoided except from necessity, yet it is also true that they should be certain, unambiguous, and decisive of the question at issue. If the issue is not guilty, it would seem, on principle, that the verdict should be responsive to that issue and, in terms, find the defendant “guilty of unlawfully withholding” the lands in controversy, or that he is “not guilty” of the matters laid to his charge “in manner and form as plaintiff has complained against him.” This, at least, was the ancient formula,⁹² and it had the merit of being definite, certain, and re-

⁹² During the early part of the last century the state of New York revised its statutes and gave a new form to the action of ejectment by the abolition of the fictions. In 1829 the supreme court adopted a new set of rules, conforming to the

amended practice, to which were appended a number of precedents approved by the court. Among others, we find precedents for verdicts, and in these precedents the fact of the guilt or non-guilt of the defendant is always established. The prac-

sponsive to the issue.⁹³ Modern practice has to some extent modified and relaxed the stringency of the old rules and it has been held that a verdict for the plaintiff need not expressly declare the defendant guilty; it is enough if such verdict finds in express terms that the plaintiff is entitled to the possession of the land sued for, describing or designating it with convenient certainty and finding the quantity of the plaintiff's estate therein.⁹⁴ But this much is essential, and a verdict lacking any of these requisites is insufficient.⁹⁵

So, too, where the statute permits a claim for damages to be united in the same action with a claim for the recovery of the land, and such claim is made, the verdict should be responsive to the issues thus presented. Where it merely establishes the title of the plaintiff to the land in dispute but does not find any wrongful act done by the defendant, the plaintiff, it would seem, cannot recover damages.⁹⁶ In a case of this kind where the plaintiff's title expires pending the litigation the verdict should find all the essential facts, as, that at the time of commencement of suit the plaintiff was entitled to the possession; that the defendant was guilty of unlawfully withholding such possession; an assessment of the damages sustained, and the fact of expiration of plaintiff's title as well as the time when it ceased.

If the verdict awards the plaintiff only a part of the land sued for it must be certain in itself, or must refer to some

tice thus inaugurated by the Revised Statutes was subsequently adopted by many other states, particularly by those of the west, and the precedents set by the supreme court of New York were generally followed. Notwithstanding that some years later the practice in New York was again changed, the fundamental ideas respecting ejectment were not materially affected, and the old New York statute of ejectment is still the basis of modern statutes upon this subject.

⁹³ See *Goodhue v. Baker*, 22

Ill. 262; *Knight v. Roche*, 56 Cal. 15; *Abbott v. Roach*, 113 Ga. 511.

⁹⁴ *Russell v. Marks*, 32 Fla. 456, 14 So. Rep. 40; *Goodhue v. Baker*, 22 Ill. 262; *Hagey v. Detweiler*, 35 Pa. 409; *Cowdrey v. Johnson*, 113 Ga. 981; *Shaw v. Hill*, 79 Mich. 86.

⁹⁵ *Johnson v. Vance*, 86 Cal. 128; *Meir v. Meir*, 105 Mo. 411; *Leprell v. Kleinschmidt*, 112 N. Y. 364; *Alexander v. Wheeler*, 69 Ala. 332; *Kyser v. Cannon*, 29 Ohio St. 359.

⁹⁶ *Clarke v. Wagner*, 78 N. C. 367.

standard by which the part so awarded can be definitely ascertained, otherwise it will be insufficient to support a judgment.⁹⁷

So, too, if the jury fail to find the estate proved by plaintiff, when this is required by law, no judgment can be rendered on their verdict.⁹⁸

In the early precedents, after the action had been remodeled, provision is always made for nominal damages in the event that the plaintiff should recover. These damages are usually fixed at six cents, the manifest object being to afford a peg on which to hang the costs. But at present the statute generally provides that the prevailing party shall recover his costs to be taxed, and where the actual damages are recovered in a subsequent action for mesne profits it does not seem necessary that any finding of nominal damages should be returned in the ejectment suit.

§ 475. **Defects and invalidities.**—It is a familiar provision of the statute, that if upon the trial the plaintiff shows his right to possession the verdict shall be for the plaintiff generally. But a verdict for the plaintiff should consist of something more than a mere general finding. In order to give stability to the judgment it should describe the land, or such definite portion thereof as the plaintiff's proofs showed that he was entitled to, and should further state the quantity and quality of his estate therein.⁹⁹ This latter is usually enjoined by

⁹⁷ Thus, a verdict awarding to plaintiff all of the land in controversy, "except the land defendant has fenced up and the land conveyed to defendant by A," was held to uncertain to support a judgment. *Slocum v. Compton*, 93 Va. 374, 25 S. E. Rep. 3. The ejectment was for a tract of land, describing the adjoiners on the north, east, south and west, containing one hundred acres, more or less; the verdict was for "plaintiff for twenty acres on the lower or south end of tract." *Held*, that the verdict was void for uncertainty. *Nolan v. Sweeny*, 80 Pa.

St. 77. So, too, where the issue related to an entire tract, a verdict, "we, the jury, find for the defendant H. W. Moore, one-half of the one thousand and twenty acres claimed by him," was held void, because it left undisposed of the remainder of the tract. *Moore v. Moore*, 67 Tex. 293, 3 S. W. Rep. 284. And see *Wilson Braden*, 48 W. Va. 196, 36 S. E. Rep. 367.

⁹⁸ *Long v. Linn*, 71 Ill. 153.

⁹⁹ *Shaw v. Hill*, 79 Mich. 86; *Wickersham Banking Co. v. Rice*, 137 Cal. 506, 70 Pac. Rep. 546.

statute, and a verdict which simply finds a right of possession in the plaintiff to the land described in the declaration, and which fails to find or specify the estate of the plaintiff, has repeatedly been held defective,¹ notwithstanding the declaration may aver that the plaintiff was seized of the lands in fee.²

A general verdict for the plaintiff is not defective because it fails to describe the land, where such land is fully and properly described in the declaration,³ and special reference is made thereto,⁴ but where only a part of the land sued for is awarded to the plaintiff the verdict must be certain in itself, or must refer to some standard by which the land so awarded can be definitely ascertained or it will be insufficient to support a judgment.⁵

In every event, the verdict must conform to the evidence. Thus, a verdict for more land than the plaintiff has proved himself entitled to, is void.⁶ Such a verdict cannot be reformed, nor can the court render judgment for the part to which title was shown. In such a case nothing can be done except to set aside the verdict.⁷

Where the statute requires the verdict to specify the estate established on the trial and found for the plaintiff, a failure to so specify renders the verdict fatally defective and no judgment can be rendered thereon.⁸ The findings of title and estate are of the essence of a verdict, particularly when required by statute. If omitted by the jury they may be sent back with directions to find these essential facts, but if a defective verdict is received and the jury discharged, the court is without power to supply the want of such findings or to render a judgment on the verdict received.⁹

¹ Long v. Linn, 71 Ill. 152; Shaw v. Hill, 79 Mich. 86, 44 N. W. Rep. 422; Lungren v. Brownlie, 22 Fla. 491; Low v. Settle, 22 W. Va. 387. But see Minkhart v. Hankler, 19 Ill. 47.

² Oney v. Clendenin, 28 W. Va. 34; Betz v. Mullin, 62 Ala. 365.

³ Grace v. Martin, 83 Ga. 245; Betz v. Mullin, 62 Ala. 365; Jones v. Railroad Co., 14 W. Va. 514.

⁴ Messick v. Thomas, 84 Va. 391, 6 S. E. Rep. 482.

⁵ Slocum v. Compton, 93 Va. 374, 25 S. E. Rep. 3; Wilson v. Braden, 48 W. Va. 196, 36 S. E. Rep. 367.

⁶ Crummey v. Bently, 114 Ga. 746.

⁷ East St. Louis v. Hackett, 85 Ill. 382.

⁸ Low v. Settle, 22 W. Va. 387; Long v. Linn, 71 Ill. 152.

⁹ As where a jury returned a

§ 476. **Directing verdict.**—A verdict may be directed in actions of ejectment as in other forms of jury trials, and if the plaintiff has made out a *prima facie* case by his proofs, and there is no rebutting evidence, it is proper for the court to instruct the jury, as a matter of law, to find for the plaintiff.¹⁰ This would follow almost as a matter of course where the defendant has offered no testimony, but the court may always direct the jury to find in a given way where there is no conflict in the evidence,¹¹ and where the plaintiff shows a complete title and the evidence offered by the defendant is incompetent and leaves no substantial question for the jury, a verdict for the plaintiff is properly directed.¹²

On the other hand, in pursuance of the familiar principle that the plaintiff must recover, if at all, upon the strength of his own title, where the plaintiff's own evidence shows that he is not entitled to a recovery, the court may direct a verdict for the defendant.¹³ In the latter event, however, the rules with respect to directed verdicts will apply, and, as a general proposition, a peremptory instruction to find for the defendant will be given only where the evidence, with all the legitimate and natural inferences to be drawn therefrom, is wholly insufficient to sustain a verdict for the plaintiff.¹⁴

But where a question of fact is involved, then, even though the defendant's evidence is contradicted, yet if he has offered any evidence in support of his own claim it should be left to the jury and it would be error, in such a case, to direct a ver-

dict reciting "we find a verdict for plaintiff," and the clerk in the journal put the verdict into proper form and the court rendered judgment thereon. In this case it was held that the verdict as signed by the jurors must be taken rather than the recitals of the clerk, and that, as the verdict actually returned lacked essential substance, no judgment could be rendered upon it. *Long v. Linn*, 71 Ill. 152.

¹⁰ *Anderson v. McCormick*, 129 Ill. 308; *Sexton v. Hollis*, 26 S.

C. 231; *Perry v. Saylor*, 118 Ga. 219.

¹¹ *Sexton v. Hollis*, 26 S. C. 231; *Casey v. Kimmel*, 181 Ill. 154.

¹² *Padgett v. Hawkins*, 100 Ga. 93; *Williams v. Milligan*, 183 Pa. 386, 38 Atl. 1015; *Casey v. Kimmel*, 181 Ill. 154; *Hallam v. Doyle*, 35 Minn. 337.

¹³ *Auburn v. Goodwin*, 128 Ill. 57; *Scott v. Nickum*, 193 Pa. 371.

¹⁴ See *Sutherland v. Cleveland*, 148 Ind. 308; *Foster v. Wadsworth*, 168 Ill. 514; *Dougherty v. Powe*, 127 Ala. 577, 30 So. Rep. 524.

dict.¹⁵ So, also, if there is any evidence tending to support the plaintiff's allegations the issues should be submitted to the jury with proper instructions.¹⁶

§ 477. Finding by the court.—In ejectment as in other actions at law, the parties may waive a jury and submit the issues to the court, but in such case the finding by the court should in all essential matters conform to the requirements of the statute relating to verdicts. That is, there should be special findings of title and estate,¹⁷ and where these facts appear the judgment will not be disturbed unless clearly against the weight of the evidence.¹⁸

II. JUDGMENT.

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| § 478. At common law. | § 493. Effect on adverse possession. |
| 479. Under the statute. | 494. Effect on persons entering <i>pendente lite</i> . |
| 480. By confession. | 495. Where plaintiff's right expires <i>pendente lite</i> . |
| 481. Conformity to verdict. | 496. Where defendant acquires plaintiff's title pending suit. |
| 482. Conditional judgment. | 497. Amendment of judgment. |
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| 489. Effect of vocation—Second trials. | |
| 490. Effect of former adjudication in a different proceeding. | |
| 491. Parties and privies distinguished. | |
| 492. Effect on after-acquired title. | |

§ 478. At common law.—By the judgment in ejectment, at common law, the plaintiff's lessor was let into possession of the lands recovered in the action, but this was about its full ex-

¹⁵ Bennett v. Morrison, 120 Pa. St. 390; Terry v. Rodahan, 79 Ga. 278; Dougherty v. Powe, 127 Ala. 577.

¹⁶ Bradley v. Drayton, 48 S. C.

234; Showers v. Emery, 16 Ohio, 294.

¹⁷ Koon v. Nichols, 63 Ill. 163.

¹⁸ Ogilvie v. Copeland, 145 Ill. 98.

tent. The verdict was not evidence in a subsequent action, even between the same parties, and the judgment entered thereon decided nothing more than that the plaintiff had shown a better right to the possession than the defendant.¹⁹ The title was not directly involved. It was customary to speak of the successful claimant as being seized of the land according to his title, but, in point of fact, only a mere possession was given to him by the judgment and his seizin was effected by a further fiction. Thus, it is an old rule of law that when a man, having title to lands, comes into possession of them by lawful means, he is held to be in possession according to his title; and hence, when possession was given by the sheriff, in execution of the judgment, the possession and title were said to unite and the plaintiff's lessor held the lands according to the nature of his interest in them. This was practically the scope of the remedy introduced into the American colonies and administered during the earlier years of the Republic.

§ 479. Under the statute.—As we have seen, by the rules of the common law, a judgment in ejectment was not conclusive upon the title of either of the parties to the record but simply determined the present right of possession. By the statute, a marked innovation upon this rule has been made in all of the states, the form and effect of the judgment being now generally regulated and prescribed by positive legislative enactment. In cases where no other provision is made the judgment in the action, if the plaintiff prevails, is, that he recover possession of the premises according to the verdict of the jury, if there was a verdict, or the finding of the court, if the case has been tried without a jury; or, if the judgment is by default, then according to the description furnished by the declaration, with costs to be taxed.²⁰ But, while this may be the form of the judgment its declared effect extends much further, and, as a rule, every judgment entered upon a verdict or finding is conclusive as to the title established at the trial upon the party against whom the same is rendered, and those claiming under him, from the

¹⁹ *Chapman v. Armistead*, 4 412; *Smith v. Sherwood*, 4 Conn. Munf. (Va.) 382; *Avery v. Fitzgerald*, 94 Mo. 207. And see ²⁰ *Minkhart v. Hankler*, 19 Ill. Mitchell v. Robertson, 15 Ala. 47.

time of such entry. If the judgment is rendered on default it becomes conclusive, in like manner, after the expiration of a specific period, usually two years.

§ 480. **By confession.**—Under the ancient practice, notwithstanding the casual ejector was a real person, it seems the court would not allow him to confess judgment, but when the system of fictions was introduced and the consent rule was adopted, it became customary, when the time for appearance had expired, to enter a rule to plead and in default thereof judgment might be entered for want of plea. When the system of fictions was abolished and the action was placed upon the same footing as other actions at law, the usual rules governing defaults and confessions were made to apply and at present ejectment is not distinguishable from other actions in this respect.

As a rule, a judgment entered as confessed is treated in the same manner and given the same force as one entered upon the verdict of a jury,²¹ and although the title of the plaintiff does not appear he will be presumed to have had a superior title.²²

§ 481. **Conformity to verdict.**—Where the verdict is for the plaintiff generally, that is, where it finds a right of property and possession in the plaintiff of the whole of the lands described in the declaration, and that the defendant is guilty of withholding them, a general judgment should be entered. But, where the verdict is special, as where the finding is that plaintiff is entitled only to a part of the premises, which is described, judgment should be rendered awarding possession of the part specifically found for him by the verdict, and as to the other part that the defendant go thereof without day.²³ So, too, if the verdict finds for a less interest than the whole estate, designating the interest to be recovered in such a way as to show its nature and extent, the judgment should follow the verdict in this respect.²⁴ In every such event a general judgment that the plaintiff recover possession of the entire tract described in

²¹ *Bradford v. Bradford*, 5 Conn. 127.

²² *Lyon v. McDonald*, 78 Tex. 71.

²³ *Cole v. McLaughlin*, 170 Ill. 278.

²⁴ *Meraman's Heirs v. Caldwell*, 8 B. Mon. (Ky.) 32.

the declaration, or of the whole estate therein, is erroneous, and will be set aside.²⁵

It is manifest, in cases like the foregoing, that judgments awarding the whole when the verdicts find only for a part, are in direct violation of the fundamental rule that the plaintiff shall recover possession of the premises according to the verdict of the jury, and they have repeatedly been held to be unauthorized and erroneous.²⁶ So, too, if the verdict be for all of the land sued for and the judgment is only for a part.²⁷

Where damages are permitted to be recovered with the land the verdict should find the extent of such damages in order to authorize a judgment therefor. Thus, where a jury returns a general verdict for the plaintiff without assessing damages, a judgment by the court for possession and damages would be unauthorized.²⁸

Nor can a verdict of recovery be extended by the judgment, as that plaintiff be adjudged to be the owner of the land and that defendant be enjoined from claiming title to the land recovered. In every case the judgment must follow the verdict and the successful party must rely upon his judgment as a bar.²⁹

§ 482. **Conditional judgment.**—It has been held that where a plaintiff in ejectment recovers he is entitled to a writ of possession, notwithstanding there may be unsettled matters between himself and the defendant growing out of the latter's occupation, and that a court has no right to enter a conditional judgment.³⁰ Where the action is regarded as strictly legal this will undoubtedly be the rule, but in a number of states the court is permitted to adjust equities and administer equitable relief and in such states a different rule may apply.³¹

²⁵ *Cole v. McLaughlin*, 170 Ill. 278; *Reilly v. Blaser*, 61 Mich. 399; *Gamble v. Daugherty*, 71 Mo. 599.

²⁶ *Marmaduke v. Tenant's Heirs*, 4 B. Mon. (Ky.) 210.

²⁷ *Obert v. Hammel*, 18 N. J. L. 73.

²⁸ *Cannon v. Davies*, 33 Ark. 56.

²⁹ *Doyle v. Franklin*, 40 Cal. 106.

³⁰ *Riverside Co. v. Townshend*, 120 Ill. 9. As where the judgment required the payment of a certain sum expended by defendant, as a condition precedent to the issuance of the writ.

³¹ See *Stevenson v. Scott*, 188

§ 483. **Description of the land.**—A judgment in ejectment should specifically describe the land recovered in the action as well as the particular estate therein to which the plaintiff is entitled,³² though in some instances where this is required a miscarriage in the entry of judgment may be obviated by the statute of amendments.³³ Such description should be certain in itself, but this requirement is met if it is sufficient to enable the sheriff to execute the judgment without examining records.³⁴ It has been held that it is sufficient if the judgment refers to the description in the pleadings,³⁵ but if this description is vague or indefinite,³⁶ or if the land is incorrectly described in the declaration,³⁷ such reference will be insufficient. In every event the judgment must be of such a character as to permit of its execution by a writ of possession.³⁸ Indeed, this latter statement seems to be the test of sufficiency.³⁹

As at present administered the statutory action of ejectment partakes of the nature of a real action and a judgment on the merits is conclusive of the title between the parties. For this reason, it is said, greater certainty of description is necessary than would be required in ejectment at common law, which is a mere possessory action in which the judgment is not

Pa. 234, 41 Atl. Rep. 533; Land Co. v. Chrisman, 172 Mo. 610.

³² Balliett v. Veal, 140 Mo. 187; Beranek v. Beranek, 113 Wis. 272, 89 N. W. Rep. 146.

³³ Thus, a judgment entry that plaintiff "do recover against the said defendant the possession of the premises aforesaid according to the description thereof contained in the said declaration," etc., though formally inaccurate in omitting to describe the premises except by reference to the declaration, is not so defective as to render the judgment invalid when attacked collaterally; this imperfection is a mere technical irregularity, and the lands being specifically described in the declaration and title in fee claimed, the recovery

is made certain by the reference to the declaration, and the error may be cured by amendment. Morse v. Hewett, 28 Mich. 481. In the foregoing case the cause was tried before the court without a jury. And see Mapes v. Scott, 94 Ill. 379; Franklin v. Haynes, 119 Mo. 566.

³⁴ Boyer v. Robertson, 149 Ind. 74, 48 N. E. Rep. 7; Franklin v. Haynes, 119 Mo. 566, 25 S. W. Rep. 223.

³⁵ Morse v. Hewett, 28 Mich. 481.

³⁶ Williams v. Kelso, 7 La. Ann. 406.

³⁷ Balliett v. Veal, 140 Mo. 187.

³⁸ Franklin v. Haynes, 119 Mo. 566.

³⁹ Davis v. Judge, 44 Vt. 500.

conclusive of the title. Hence, the premises should be so described that the record will furnish evidence of limits to which title is established by the judgment, as well as to point out to the sheriff who serves the writ of possession the extent and location of the land recovered.⁴⁰

§ 484. **Description of estate.**—As the verdict of the jury should specifically find the quantity of interest to which the plaintiff is entitled, so also should the judgment confirm this interest by special mention, yet in practice this is often omitted, and, when the entry of judgment contains references which tend to indicate such interest with certainty, the omission has been held not fatal to validity. Thus, where plaintiff claims to own the land sued for in fee, and the verdict finds the defendant guilty, and that plaintiff is the owner in fee of the lands described in the declaration, a judgment that plaintiff is entitled to and shall have and recover of and from the defendant the possession of the land described in the declaration, to wit, etc., though technically defective, yet, when considered, in connection with the verdict it will be sufficient to show the estate recovered and will be allowed to stand.⁴¹

As a rule, however, the judgment, following the verdict, should specifically designate the estate recovered.⁴²

§ 485. **Description of interest recovered.**—In many cases it is essential that the judgment should describe the specific interest in the land to which the plaintiff has shown himself entitled.⁴³ While it is permissible in many states for the owner of an undivided interest to sue for and recover the whole as against a stranger to the title, yet it is never proper to allow such owner to recover the whole where it is shown that the defendant owns another undivided interest. In such case the judgment should be to the effect that plaintiff is the owner of such undivided interest, and that he be let into possession with the defendant according to their respective interests.⁴⁴

⁴⁰ *Davis v. Judge*, 44 Vt. 500.

⁴¹ *Mapes v. Scott*, 94 Ill. 379;
Hawley v. Twyman, 24 Gratt.
(Va.) 516.

⁴² *Koon v. Nichols*, 63 Ill. 163;
Beranek v. Beranek, 113 Wis.
272.

⁴³ *Mahoney v. Middleton*, 41
Cal. 41.

⁴⁴ *Foster v. Hackett*, 112 N. C.
546; *Mahoney v. Middleton*, 41
Cal. 41.

§ 486. **Operation and effect.**—A judgment in ejectment does not transfer to the successful party the title of the adverse party, but, if presented in proper form whenever such adverse title is drawn in issue, it shuts out all proof of same, and, in effect, bears a closer resemblance to an extinguishment than to a transfer of such adverse or opposing title. The judgment awards the possession of the lands to the prevailing party, because he had title at the commencement of the action, and because the losing party had no title, or not such a title as would authorize him to withhold the possession; but it neither directly nor indirectly transfers the title.⁴⁶

Neither does the successful party, by virtue of a judgment in ejectment, acquire any title to the lands in controversy other than that which he previously had. The only advantage gained in this respect is the decision settling the rights of the parties and the merits of their conflicting claims. There is some confusion in the decided cases with respect to these views but they are sustained by the general theory of the action and by the further fact that the only effective force of the judgment is to award possession.⁴⁶

§ 487. **Conclusiveness of judgment.**—It is a familiar doctrine with respect to legal adjudications that a judgment of a court of competent jurisdiction is not only final as to the subject-matter, but also as to every other matter which the parties might have litigated in the case, and which might have been decided.⁴⁷ Hence, a general finding of title in the plaintiff has been held a conclusive and binding decision against the defendant on all matters relating to title, from whatever source derived,⁴⁸ and, in furtherance of the principle that the estoppel of a judgment extends not only to every material matter within the issues which was expressly litigated but also to those matters which might or should have been litigated and determined,

⁴⁶ Mahoney v. Middleton, 41 Cal. 41; Smith v. Shakleford, 9 Dana (Ky.), 452. 102; Hobby v. Bunch, 83 Ga. 1; Tadlock v. Eccles, 20 Tex. 782; Mahoney v. Middleton, 41 Cal. 41; Sanders v. Peck, 131 Ill. 408.

⁴⁷ Consult Bell v. Peterson, 105 Wis. 607; Barber v. James, 21 R. I. 279; Goldsmith v. Smith, 21 Fed. Rep. 611. ⁴⁸ Hentig v. Redden, 46 Kan. 231; Reed v. Douglas, 74 Iowa, 244; Edwards v. Roys, 18 Vt. 473.

⁴⁷ Huntly v. Holt, 59 Conn.

effectually concludes the defendant from asserting a claim of title of any kind which existed at the time of the rendition of the judgment or decree.⁴⁹

The reason assigned for the rule is based primarily on the old maxim that the law discourages a multiplicity of suits, but it is a further policy of the law that parties should not be permitted to try the title to real property by piece-meal, in separate and independent actions upon separate claims, when the evidences of such separate claims are in their control at the time the general issue is presented; therefore, as conducing to the quiet and repose of titles, where all matters in controversy as to the title or right of possession may be finally ended in one action, the law requires that this be done.⁵⁰

An apparent exception to this rule exists in some states where the old practice of allowing successive suits until two concurring judgments are obtained still prevails. But the exception is more apparent than real, for even where a new trial is permitted as of right the rule still holds good that, until set aside by the bringing of a new action, the judgment is conclusive as to the parties thereto and the matter adjudicated upon.⁵¹

§ 488. Judgment as an estoppel.—As stated in the preceding paragraph the judgment of a court of competent jurisdiction is always conclusive on the parties thereto, and persons in privity with them, as to all points directly involved therein and necessarily determined, while under the provisions of the civil codes such judgment is not only final as to the subject-matter, but also as to every other matter which the parties might have litigated in the case and which they might have had decided. The apparent exception where successive suits may be prosecuted, as is still the rule in a number of states, does not change the principle of *res judicata* but only extends it.

⁴⁹ Hentig v. Redden, 46 Kan. 231; Foster v. Hinson, 76 Iowa, 714; Freeman v. McAninch, 87 Tex. 132; Bradley v. Lightcap, 201 Ill. 514.

⁵⁰ Hentig v. Redden, 46 Kan. 231. And see Mahoney v. Middleton, 41 Cal. 41; Edwards v.

Roys, 18 Vt. 473; Reed v. Douglas, 74 Iowa, 244; Huntley v. Holt, 59 Conn. 102; McCullough v. Dashiell, 85 Va. 37; Tadlock v. Eccles, 20 Tex. 782.

⁵¹ Sanford v. Herron, 161 Mo. 176, 61 S. W. Rep. 839, 84 Am. St. 703.

A judgment in ejectment, or its statutory substitutes, is conclusive of the title between the parties in favor of the one recovering such judgment,⁵² and operates as an estoppel not only to the assertion of the particular title in issue but also as to any other that might have been presented and passed upon.⁵³ This follows from the reason that when a fact has been once determined in the course of a judicial proceeding, and a final judgment has been rendered in accordance therewith, it cannot be again litigated between the same parties without virtually impeaching the correctness of the former decision, which, from motives of public policy the law does not permit to be done. A general finding of title in the plaintiff necessarily involves the finding of no title in the defendant, and this becomes a part of the essential groundwork upon which the judgment is founded. It is allowable to reason back from a judgment to the basis on which it stands, upon the obvious principle that where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion.⁵⁴ Hence, where the record shows an action to recover the possession of land, and a verdict and judgment in favor of the plaintiff for the whole, parol evidence is not admissible to show that the only question litigated was one of boundary, and that the question as to the title to a part of the tract recovered was not, in fact, submitted for decision nor decided.⁵⁵

But the estoppel of a judgment in ejectment, as a general rule, extends only to titles actually existing at time suit was instituted and which were or might have been litigated in the action.

§ 489. Effect of vacation—Second trials.—The statute has made provision in many states for a retrial of the issues

⁵² *Sanford v. Herron*, 161 Mo. 176, 84 Am. St. 703, 61 S. W. Rep. 839; *Hurd v. Harvey Co.*, 40 Kan. 92; *Reed v. Douglas*, 74 Iowa, 244; *Freeman v. McAninch*, 87 Tex. 132; *Long v. Webb*, 24 Minn. 380.

⁵³ *Hentig v. Redden*, 46 Kan. 231; *Hackworth v. Zollars*, 30

Iowa, 433; *Morrill v. Morrill*, 20 Oreg. 96; *Sturtevant v. Randall*, 53 Me. 153; *Bradley v. Lightcap*, 201 Ill. 514.

⁵⁴ *Burlen v. Shannon*, 99 Mass. 200; *Redden v. Metzger*, 46 Kan. 285.

⁵⁵ *Freeman v. McAninch*, 87 Tex. 132.

in ejectment proceedings. Where application is made in apt time, and the requirements of the statute are otherwise complied with, the defeated party may have the former judgment vacated and a new trial of the cause. The effect of such an order is to render the prior judgment wholly inoperative and leave the parties in the same position they occupied before the trial.⁵⁶ It necessarily follows, in such a case, that the usual doctrine of *res judicata* can have no application. Indeed, for the purposes of the second trial there is no former judgment; it has been vacated, set aside, and is held for naught. The re-trial proceeds as though there had never been a former judgment, and therefore no questions of estoppel can arise, even though the evidence offered in the second trial is identical with that offered in the first trial.⁵⁷

§ 490. **Effect of former adjudication in a different proceeding.**—Closely allied to the matters discussed in the preceding paragraphs is the effect to be accorded to a prior adjudication of the same subject-matter between the same parties, although in a different mode of proceeding. The general rule is that such adjudication operates as an estoppel upon the parties against subsequent litigation, at least as to all matters that were actually in controversy and decided by the judgment rendered therein.⁵⁸ Hence, where a party has established his title to land by a decree in chancery, he will be estopped from prosecuting to judgment an action of ejectment to recover possession of the same land.⁵⁹ This would certainly be the case if the plaintiff had been put into possession under the decree, and the fact that such decree was appealed from would furnish no grounds on which to prosecute the concurrent action at law. This follows for the reason, that the appeal does not vacate or set aside the decree, but merely suspends its execution, leaving it in full force as a merger of the cause of action and a bar to its further prosecution.⁶⁰

⁵⁶ *Sheldon v. Van Vleck*, 106 Ill. 45. 102; *Foster v. Hinson*, 76 Iowa, 714.

⁵⁷ *Hammond v. Carter*, 161 Ill. 621. ⁵⁸ *Moore v. Williams*, 132 Ill. 589; *Peters v. Banta*, 120 Ind. 416.

⁵⁹ *Garrick v. Chamberlain*, 97 Ill. 620; *Hanna v. Read*, 102 Ill. 596; *Huntley v. Holt*, 59 Conn. 154; *Oakes v. Williams*, 107 Ill. 154; *Burton v. Burton*, 28 Ind.

§ 491. **Parties and privies distinguished.**—The general rule is that judgments are conclusive on both parties and privies. Parties are all who are directly interested in the subject-matter of the litigation or who have a right to prosecute, defend, or control the proceeding;⁶¹ and, it is said, courts will even have a right to look beyond the nominal parties and treat as the real parties those whose interests are involved in the issue and hold them concluded by any judgment that may be rendered.⁶² Privies, are those whose relationship to the same right of property is mutual or successive. A privy to a judgment is one whose succession to the rights of property thereby affected accrued after the institution of the particular suit, and from a party thereto.⁶³ The privity may be in blood, in law, or in estate, but however existing the bar of a judgment is equally as effective between privies as between parties.⁶⁴

But while courts, in some instances, have been disposed to give a very liberal construction to the acts regulating the practice in ejectment, and to include within the effect of judgments rendered in the action all persons in interest, the weight of authority, as well as legal reason, confines such effect to the parties of record and their privies, or, to be more exact, to persons claiming by, through or under such record parties by title accruing after the commencement of the action.⁶⁵ The old New York statute, which forms the basis of the larger portions of the present legislative enactments in most of the states, distinctly provides that the conclusive effect of the judgment applies only to parties and those claiming under them. Wherever this statute has been construed the general rule, that statutes are not presumed to alter the common law farther than they expressly declare, has been very uniformly applied and the word "party" has been held to mean only the person or persons named in the record, and the record itself is held to be the test as respects the person or persons against whom the

342; *Peters v. Banta*, 120 Ind. 416.

⁶¹ *Giltinan v. Strong*, 64 Pa. St. 242.

⁶² *Peterson v. Lothrop*, 34 Pa. St. 223.

⁶³ *Orthwein v. Thomas*, 127 Ill. 554.

⁶⁴ *Drexel v. Man*, 2 Pa. St. 267.

⁶⁵ *Lipscomb v. Postell*, 38 Miss. 476; *Blue v. Blue*, 38 Ill. 9.

verdict is rendered.⁶⁶ It will be seen, then, that under the provisions of these statutes there is a marked difference between parties of record and their privies and parties in interest, and that, while the former are concluded by the judgment the latter may not be.⁶⁷

§ 492. **Effect on after-acquired title.**—There can be no dispute with respect to the fundamental rule that a judgment at law, in any form of action, is conclusive upon parties and privies upon all questions, rights, and titles, involved in the litigation and passed upon by the court; nor with respect to the further rule, that whenever the same questions, or the same rights and titles are again drawn in issue, either at law or in equity, between the same parties or those in privity with them, the previous adjudication will estop them from again opening the controversy or relitigating the questions. But to these well known and universally received rules there must be appended an important qualification, viz.: that the matter must have been one which the court had power and jurisdiction to hear and determine.

A judgment in ejectment is not distinguishable in its general features from other judgments in legal actions and the rules just stated apply to it with the same force as to other judgments and subject to the same qualification. It will frequently happen, however, that a party to an ejectment suit acquires a subsequent and different title from that presented on the trial and the question then arises as to how far the prior judgment is conclusive and to what extent, if any, the new title may be employed in a subsequent action.

⁶⁶ *Byers v. Rippey*, 25 Wend. (N. Y.) 431; *Cadwallader v. Harris*, 76 Ill. 370; *Whitney v. Higgins*, 10 Cal. 547; *Short v. Galway*, 83 Ky. 501.

⁶⁷ Thus, a recovery in ejectment against the vendee of land who is in possession under a contract for purchase, is not conclusive upon the rights of the vendor, who was not a party of record, even though he had notice of the pendency of the suit,

and the judgment cannot be interposed as a bar to an action of ejectment subsequently brought by him for the same land. *Cadwallader v. Harris*, 76 Ill. 370. So, too, a judgment against a tenant is not evidence against the landlord unless he was admitted to defend or join with the defendant in making the defense, notwithstanding he may be dispossessed by the writ of possession against the tenant if

The title involved is usually the one asserted by plaintiff. He is required to sustain his allegations by proofs and the question actually presented and decided is, whether those proofs are sufficient. If they are, he is entitled to recover; if they are not, judgment is passed against him and all questions arising out of the title asserted are considered closed. As a rule, such trial and determination do not affect the defendant's title in any way; nor does the judgment even admit that he had any title; it simply decides that the plaintiff had none.⁶⁸ In such event what would be the rights of the unsuccessful plaintiff who subsequently acquires a new title? Would the proceeding in the ejectment suit be within the doctrine of *res judicata* and could the defendant in that suit, if still in possession, urge such suit as a bar to second action? The answer of the authorities would seem to be that an unsuccessful plaintiff may, by the acquisition of new title, rehabilitate himself, and that upon such new title he may again bring ejectment against the former defendant or whoever may happen to be in possession of the premises, and the former adjudication will constitute no impediment to a recovery.⁶⁹ This rule proceeds upon the theory that the new title thus put in issue was not involved or passed upon in the former trial and, hence, cannot be affected by that adjudication.

§ 493. Effect on adverse possession.—As to the legal effect of a judgment in ejectment with respect to the adverse possession of those against whom it is rendered the authorities are not in accord. It has been held, in some cases, that the recovery of the judgment *ipso facto* destroys the continuity of possession under an adverse holding and stops the running of the statute, notwithstanding the actual possession of the occupant has not been disturbed.⁷⁰ It is further held, by this line

he receives possession from the latter *pendente lite*. *Wilson v. State*, 115 Ala. 129, 22 So. Rep. 567.

⁶⁸ *Hawley v. Simons*, 102 Ill. 115.

⁶⁹ *Hawley v. Simons*, 102 Ill. 115; *Barrows v. Kindred*, 71 U. S. 399.

⁷⁰ See *Brolaskey v. McClain*, 61 Pa. St. 146. In this case a party had been in possession for eight years when action was commenced; seven years thereafter judgment was recovered against his heirs, who, it seems, then continued in actual possession for ten years more. *Held*,

of decisions, that in order to suspend the statute of limitations, as against the plaintiff in ejectment, it is not necessary that a writ of possession should issue or that the plaintiff should take possession under his judgment.⁷¹ The decisions supporting this view rest upon the principle that a judgment in ejectment is *res judicata* as to the parties thereto and the matter adjudicated until set aside or reversed, or its legal effect destroyed by the result of another action by the same parties. While such judgment does not prevent a defendant from bringing another action to try the title, yet until he does so both he and his privies are bound thereby during the life of the judgment.⁷²

The better rule, however, would seem to be that a judgment in ejectment against a party who holds adversely does not, of itself, suspend the operation of the statute. To have that effect there should be something done under it to subordinate the defendant's possession to the plaintiff's title; a writ must be sued out, or an entry made, or, in some way, there must be an actual or constructive change of possession. The judgment establishes a right to possession, but does not establish a new title so as to interrupt the running of the statute.⁷³

§ 494. Effect on persons entering pendente lite.—It is a familiar rule of law that one who purchases any interest in land then the subject of litigation, from any of the parties to such controversy, must be held to abide the ultimate decision that may be rendered in the case. And, in ejectment, one who enters under the defendant, after the commencement of the action, must yield up possession to the prevailing plaintiff or suffer himself to be ousted by the writ of restitution.⁷⁴ Indeed,

that the recovery of the judgment suspended the running of the statute of limitations. In *Gower v. Quinlan*, 40 Mich. 572, it was held that continuity of possession was broken by a decree requiring the occupant to convey the land. To the same effect, *Sanford v. Herron*, 161 Mo. 176.

⁷¹ *Estes v. Nell*, 140 Mo. 639, 41 S. W. Rep. 940.

⁷² See *Estes v. Nell*, 140 Mo. 639.

⁷³ *Doe v. Reynolds*, 27 Ala. 364; *Jackson v. Haviland*, 13 Johns. (N. Y.) 229; *Smith v. Trabue*, 1 McLean, (C. Ct.) 87; *Elder v. McClaskey*, 70 Fed. Rep. 554; *Carpenter v. Natoma, etc. Co.*, 63 Cal. 616. And see *Barrell v. Title Guarantee Co.*, 27 Oreg. 91.

⁷⁴ *Ritchie v. Johnson*, 50 Ark. 551; *Hanson v. Armstrong*, 22 Ill. 442; *Howard v. Kennedy*, 4 Ala. 592.

the law will presume that all who enter after action brought come in under the defendant, and, if the plaintiff recovers, must, for that reason, go out under the writ.⁷⁵ The presumption is rebuttable, however, and if, in fact, such subsequent entry is made not through the parties to the action but in pursuance of an independent and hostile claim, then this fact will protect the occupant and the final determination will not affect his rights.⁷⁶ But to render the defense of independent title available as a shield against the effect of the judgment there must be no privity of any kind between the defendant in the action and the subsequent occupier, and, notwithstanding that such occupant may claim under an independent title, if he also claims under the defendant, he will not be permitted to tack the possession acquired from the defendant to the subsequently acquired independent title, and thus bid defiance to the writ.⁷⁷

§ 495. **Where plaintiff's right expires pendente lite.**—Under the ancient form of the action, when the term was considered substance, and hence not amendable, the plaintiff was non-suited if the term expired before the trial, but it seems he was still permitted to proceed for his damages and costs, although denied a recovery of the land. The reason for this was, that the right to damages for the ouster remained, notwithstanding the right to possession under the lease was determined.

The modern statutory remedy has preserved the spirit of the ancient law, and, while the general rule is that the plaintiff shall recover according to his right at the time suit was brought, yet, if his right or title shall expire after the commencement of the suit, but before trial, the verdict must be returned according to the fact, and judgment should be that he recover his damages, to be assessed, by reason of the withholding of the premises by the defendant, and that as to the premises claimed the defendant go thereof without day.

⁷⁵ *Sampson v. Ohleyer*, 22 Cal. 200; *Wetherbee v. Dunn*, 36 Cal. 147; *Oetgen v. Ross*, 47 Ill. 142.

⁷⁶ *Clark v. Parkinson*, 10 Allen (Mass.), 133; *Ford v. Doyle*, 37

Cal. 346; *Powell v. Lawson*, 49 Ga. 290; *Garrison v. Savignac*, 25 Mo. 47.

⁷⁷ *Ritchie v. Johnson*, 50 Ark. 551; *Montgomery v. Whiting*, 40 Cal. 294.

It would seem that the object of the statute is to save the rights of a plaintiff who at the institution of a suit has a valid right of recovery which subsequently, for any reason, ceases before trial. This was certainly the idea of the old law and is practically the letter of the modern statute. We may illustrate the principle by taking the case of a tenant for years whose term expires by limitation, or a tenant for life *per autre vie*, where the person whose life was the limit of the estate dies. In each of these cases there is an actual "expiration" of the plaintiff's right, but, having a valid and enforceable claim at the time suit was commenced, he should, in common fairness, be permitted to recover his damages even though his right to recover the land be denied. In this view the authorities are substantially agreed. A somewhat different question is presented where the right or title of the plaintiff does not "expire," in the strict construction of the term, but is simply transferred to another; as where the owner in fee conveys the land in controversy pending the suit. In such event it has been held that the conveyance will not defeat the right of recovery and that the statute above referred to does not apply.⁷⁸

§ 496. **Where defendant acquires plaintiff's title pending suit.**—A somewhat peculiar question is presented where the right of possession passes from the plaintiff and becomes vested in the defendant during the pendency of the suit. It is clear that upon principles of abstract justice the plaintiff, in such event, should not be permitted to have a judgment for possession, although, technically, he would be entitled to same under the ordinary forms of pleading. It may be said that where such a transfer has resulted from the voluntary act of the parties the question is without practical interest, as the convention which produced the change of possession must, as a rule, provide for the termination of the suit by a dismissal of the declaration. In the ordinary case this would undoubtedly be true, yet cases may occur where the plaintiff will insist upon a judgment, as well for the taxation of costs as for an ultimate right to recover the mesne profits. Thus, say a corporation conducting a public utility, or a town desirous of acquiring a site

⁷⁸ *Mills v. Graves*, 44 Ill. 50.

for some public use, enters upon land without right and ousts the owner therefrom. He may at once resort to an ejectment, and, as he possessed title at the time suit was brought, should have no difficulty in securing a judgment for the possession. But suppose further, that the defendant, without the concurrence of the plaintiff, but under the regular forms of law, shall, during the pendency of the suit, become invested with the plaintiff's title; as where the land is properly condemned and full compensation paid or tendered. Such title should be accorded the same respect and given the same protection as one obtained in any other mode, and in a case of this kind we can readily see where the question involved in this paragraph would become very important.

It does not seem that this question has been much considered by the courts, but where it has been presented the holding has been that where a plaintiff's right of possession has been extinguished it would be an idle act to award a possession he could not hold after it had been given to him, and that where a defendant, in a lawful manner, has become the owner of land he should not be deprived of its possession. When, therefore, a case of this kind occurs it seems the proper practice is to plead the facts as a bar to the further maintenance of the suit, and upon such plea the court may enter a judgment of discontinuance and award costs according as the rights of the parties may appear.⁷⁹

§ 497. **Amendment of judgment.**—It is said that judgments may be amended in the furtherance of justice and statutes to this end, in many of the states, permit corrections of errors which have intervened through mistake, inadvertence, surprise, or excusable neglect. But even where this doctrine is recognized and such statutes prevail, the general rule still seems to be that a court is without power to alter, vary or amend a final judgment after the close of the term at which it was rendered, except for the correction of mere clerical errors or omissions.⁸⁰ The theory of the entry of judgments and the

⁷⁹ *Leavitt v. School District*, 78 Me. 574.

⁸⁰ *Carlisle v. Killebrew*, 91 Ala. 351; *Cook v. Moore*, 100 N. C.

294; *Bank v. Blye*, 119 N. Y. 414; *Cook County v. Calumet Canal Co.*, 131 Ill. 505.

power of correction seems to be, that the court has authority at all times in term, to amend and correct its records so as to make them speak the truth and be consistent, and to make proper entries *nunc pro tunc* that were certainly intended but omitted by mistake, accident, or inadvertence of the officers of the court. Such authority is essential to the proper administration of justice, and is universally recognized as one of the inherent powers of a lawfully constituted tribunal. Ordinarily the entries made in the course of the business of the court are presumed to be correct, and import absolute verity while they are allowed to remain. But, it is contended, the mere entry in writing on the minutes from which the record is made up does not itself constitute the judgment of the court; it is only evidence of it. The judgment is the conclusion of law as determined and applied by the court to the case before it, and, it is said, remains in the mind of the court until it shall be truly entered of record. When the conclusion of the law in a case is thus reached, the court cannot, after the term at which it was entered, interfere with it. The entry of record, however, must embody and be what the court actually determined,—what it decided, and what it intended should be so entered; otherwise the judgment that was pronounced will not have been entered of record. Hence, the court may, at a subsequent term, enter it correctly *nunc pro tunc*. But this is the full extent of its power. It cannot amend or modify a judgment regularly entered of record at a preceding term, but may correct, amend or modify such a one improperly entered, or enter one which, through accident, mistake of fact, or inadvertence of the court, was not properly entered.⁸¹

As between the original parties it does not seem that there is any limitation of time in which such amendments may be allowed, so long as anything definite and certain remains to amend by,⁸² but all amendments must be made with a saving of the intervening rights of third persons, if any.⁸³ This follows from the fact that until the amendments are actually

⁸¹ Per Merrimon, J., in *Cook v. Moore*, 100 N. C. 294.

⁸² *McCormick v. Wheeler*, 36 Ill. 114; *Ryon v. Thomas*, 104

⁸³ *Church v. English*, 81 Ill. Ind. 59.
442.

made, third persons can act upon nothing but the official record, which imports absolute verity, and therefore all rights previously acquired upon the faith of the record are in no manner affected by subsequent amendments.⁸⁴

§ 498. **Annulment of judgment.**—Many of the observations of the preceding paragraph relating to amendments apply to motions or proceedings for annulment, and the same principles which prevent a court from amending a judgment at a subsequent term prevent it from annulling or vacating it except where the judgment is void on its face, either for want of jurisdiction of the subject-matter or of the parties.⁸⁵ Applications of this kind are frequently based upon a want of sufficiency in the description of the land sought to be recovered, resulting in uncertainty, and most of the cases turn on this point.

It has been said that every judgment of a court of justice must be perfect in itself, or capable of being made perfect by reference to the pleadings or to the papers on file in the cause, or to other pertinent entries on the docket,⁸⁶ and this is particularly true where the judgment is of a special character and not only confirms rights, but rights in or to a specific thing. In ejectment a general verdict is sufficient,⁸⁷ and, in such case, recourse may be had to the declaration for a description of the lands to be recovered. If the judgment follows the declaration this will generally be sufficient, nor is it essential that from a mere inspection of the description the court may be enabled to know just what lands were intended. The tract may be designated by some name not understood by the court, but familiar to persons acquainted with the neighborhood in which the land is situated, and if by evidence *aliunde* it can be shown that the descriptive words though apparently meaningless do in fact designate a particular tract, in such a manner that its identity can be readily be ascertained by persons who are familiar with it, the judgment is sufficiently certain.⁸⁸ As a rule,

⁸⁴ McCormick v. Wheeler, 36 Ill. 114; Church v. English, 81 Ill. 442; Indiana, etc. Ry. Co. v. Bird, 116 Ind. 217.

⁸⁵ Carlisle v. Killebrew, 91 Ala. 351.

⁸⁶ Alexander v. Wheeler, 69 Ala. 342.

⁸⁷ Chapman v. Holding, 60 Ala. 522.

⁸⁸ De Sepulveda v. Baugh, 74 Cal. 468; Carlisle v. Killebrew,

a judgment will not be pronounced a nullity for uncertainty of description unless it is fully apparent on its face that nothing is described.⁸⁹ It will often happen that a description of itself is insufficient to definitely locate land and yet it may be sufficient as a designation, which, aided by extrinsic matters, is capable of being reduced to certainty. Thus, a judgment for the recovery of "fraction No. 12, a part of the southeast quarter and northeast quarter of section 16, township 4, range 4, containing 34.75 acres," which description follows that in the declaration, is not void upon its face, notwithstanding that it fails to definitely locate the land. There may be diagrams, plats, or surveys from which the exact limits and boundary lines of the fraction can be ascertained and these may be resorted to in all proper cases for the purpose of definite location.⁹⁰ On the other hand, we find courts holding strictly to the rules of conveyancing and refusing to make intendments for uncertain descriptions, and where the description in the declaration is incorrect, or where it is impossible therefrom to locate the land, a judgment founded thereon cannot stand.⁹¹

But where the verdict is special, as where it embraces only a part of the lands sued for, it is necessary in all cases to describe either the part to be recovered or the part which is denied, and this in such a manner that an effective judgment can be entered upon it. Where the verdict is ambiguous, or fails to designate the precise tract to be recovered, and there is nothing in the pleadings or papers on file, or entries made, to define such tract, a judgment entered thereon will be void for uncertainty.⁹² Again, the judgment must not depart from the verdict, and a material variance will generally vitiate it.⁹³ This is particularly true in the case of special verdicts.⁹⁴

⁸⁹ Ala. 334; *McPike v. Allman*, 53 Mo. 551. And see *Freeman on Executions*, § 281.

⁹⁰ *De Sepulveda v. Baugh*, 74 Cal. 468, 5 Am. St. 455.

⁹¹ *Carlisle v. Killebrew*, 91 Ala. 351, 24 Am. St. 915. See *Boyer v. Robertson*, 149 Ind. 74.

⁹² *Balliett v. Veal*, 140 Me. 187, 41 S. W. Rep. 736.

⁹³ *Alexander v. Wheeler*, 69

Ala. 342. In this case the jury found for the plaintiff for "the land running to the Ferguson and Allen line," but there was nothing to show where such line was.

⁹⁴ *Obert v. Hammel*, 18 N. J. L. 73.

⁹⁵ See *Cole v. McLaughlin*, 170 Ill. 278; *McCraven v. Doe*, 23 Miss. 100.

§ 499. **Against officers of United States.**—Notwithstanding some earlier cases to the contrary it would now seem to be an established rule that an action of ejectment will lie against the agents or officers of the United States for the recovery of lands in the possession of such officers. The mere fact that the demanded premises are held for and on behalf of the government will not oust the jurisdiction of the court, and a plea of title in the United States is not distinguished from a plea of title in any other third person. Should such an issue be raised the court is bound to try it, the same as any other issue in the case, and render judgment in accordance with the verdict.⁹⁵

But while such procedure is no longer open to doubt, it would yet seem that the effect of a judgment rendered against the defendant is not governed by the same rules that obtain generally in the action. Ordinarily the judgment in ejectment works an estoppel, binding alike on parties and privies. But where the judgment is recovered against a mere officer of government, holding possession of the demanded premises solely by virtue of his office, such judgment, while it decides the question of title and finds the rights of the plaintiff, does not conclude the government, nor estop it from relitigating the title. Notwithstanding such judgment it may still avail itself of all the remedies which the law affords to every person, natural or juristic, for the assertion and vindication of rights. It may bring an action in equity to quiet its title, and, in a proper case, a writ of injunction may be obtained; or it may bring an action of ejectment in which, on a direct issue, its title may be judicially determined; or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, it may condemn it by a judicial proceeding in which a just compensation shall be ascertained and paid.⁹⁶

§ 500. **Against persons deceased.**—It is a maxim of the common law that a judgment can be rendered only against a living person and from this is derived the rule that an action abates by the death of the defendant. Hence, a judgment

⁹⁵ See § 171, *supra*.

⁹⁶ *United States v. Lee*, 16

Otto, (U. S.) 196; *King v. Langrange*, 61 Cal. 221.

against a person dead at the time of its rendition is void, and may be assailed collaterally. This doctrine has been retained in a number of states,⁹⁷ and where it prevails such a judgment has no force or effect. It does not bind the parties, creates no estoppel, divests no rights, and may be set aside either directly or in a collateral proceeding.

But while the foregoing views are entertained in a few states the volume of authority sustains the proposition that a judgment against a deceased person is not void, but irregular and erroneous only. In other words, that it is voidable upon a proper application made but until set aside by some appropriate proceeding is valid and conclusive of the question adjudicated.⁹⁸ It is contended that where a court acquires jurisdiction of the parties and of the subject-matter of the litigation, it possesses the power to proceed to the final disposition of the action, and while it should cease to exercise its jurisdiction over a party at his death, yet the neglect so to do would amount to no more than an error, to be corrected by some proceeding in the action, and the judgment, although irregular, is not, on that account, subject to collateral assault.⁹⁹ It is further contended, in support of this proposition, that an action of ejectment is, in one sense, a proceeding *in rem*, and therefore a judgment of recovery where one or more of the defendants is dead, the death not having been suggested upon the record, is, at most, merely irregular.

§ 501. Effect on landlord of judgment for or against tenant.—An action of ejectment is properly brought against the party in the actual occupancy of the premises. When such occupant is a tenant it is his duty at common law, as well as under the statute as generally enacted, to notify his landlord

⁹⁷ See *Weis v. Aaron*, 75 Miss. 65 Am. St. 594; *McCloskey v. Wingfield*, 29 La. Ann. 141; *Bragg v. Thompson*, 19 S. C. 572; *West v. Jordan*, 62 Me. 484; *Meyer v. Hearst*, 75 Ala. 390; *Life Ass'n v. Fassett*, 102 Ill. 315. But compare *Claffin v. Dunne*, 129 Ill. 241.

⁹⁸ *McCormick v. Paddock*, 20

Neb. 486; *Carr v. Townsend*, 63 Pa. St. 202; *Reid v. Holmes*, 127 Mass. 326; *Knott v. Taylor*, 99 N. C. 511; *Harrison v. McMurray*, 71 Tex. 122.

⁹⁹ See *Hays v. Shaw*, 20 Minn. 405; *Gilman v. Donovan*, 53 Iowa, 362; *Mitchell v. Shoonover*, 16 Greg. 211; *McClelland v. Moore*, 48 Tex. 355.

of the pendency of the suit, and thereupon a corresponding duty devolves upon the landlord to protect the possession of his tenant. If the tenant fails to discharge this duty and judgment of recovery is rendered against him, the landlord is no more bound thereby than he would be by a judgment in any other legal proceeding to which he was not a party.¹

But where a landlord has been notified by his tenant that action has been commenced, and has timely knowledge of the suit and an opportunity of asserting his rights, whether he avails himself of such opportunity or not, he will be concluded by a judgment for the plaintiff, though the judgment may have been only against the tenant, in name.² And it would seem that this result will follow if the landlord has actual knowledge of the suit, no matter how such knowledge was derived.³

It has been held that a judgment in ejectment in favor of a tenant does not inure to the benefit of the landlord nor work an estoppel in his favor, unless he has openly appeared in the case and undertaken the defense, and, in such event, whether he defends in the name of the tenant or is substituted in his place, such appearance or substitution should be entered of record.⁴ This doctrine proceeds upon the principle that the parties to be estopped must be indicated by the record, and "it would be dangerous," observes the court in one case, "to extend the rule to cases where there is nothing in the record of the action tending to show that the landlord took the defense upon himself."⁵

§ 502. *Revivor*.—By the old rule of the common law a judgment became dormant unless execution was issued within a year and a day after it had been entered, and the early practice in this country was the same as under the old English law. This practice, however, has been very much altered by legis-

¹ *Oetgen v. Ross*, 47 Ill. 142;
Lowe v. Emerson, 48 Ill. 160;
Rogers v. Rippey, 25 Wend. (N.
Y.) 432; *Valentine v. Mahoney*,
37 Cal. 393.

² *Oetgen v. Ross*, 47 Ill. 142;
Thomsen v. McCormick, 136 Ill.
135.

³ *Thomsen v. McCormick*, 136
Ill. 135.

⁴ *Loftis v. Marshall*, 134 Cal.
394, 86 Am. St. 286, 66 Pac. Rep.
571.

⁵ *Valentine v. Mahoney*, 37 Cal.
393.

lation in all of the states, but the old idea which imputed laches after a certain interval of time had elapsed has been retained and it is still the rule that unless execution shall be issued within a fixed period, varying from five to seven years, a judgment becomes ineffective unless revived.

When the action of ejectment was introduced the practice already established in other cases, with respect to writs of execution, seems to have been followed, both in England and America.⁶ But when the action was remodeled, as described in other parts of this work, no provision was made respecting the time within which a writ of possession should issue, while subsequent legislation made the judgment in the action, while remaining unreversed, conclusive of the title of the successful party, and of his right to possession of the premises recovered, without regard to the mode of execution. It is true, that the general rules of practice in other actions at law are now made to apply to actions of ejectment, but only in so far as they may be adapted to that remedy, and much of the confusion that has arisen has grown out of the failure to properly distinguish between executions of money judgments and writs of possession. The lien of a judgment for a specific sum of money has no analogy to the property right which is established by a judgment in ejectment, and the rules provided for the preservation of such lien by execution are not applicable to writs of possession. The lien is a mere right to have the land upon which it rests sold for the purpose of making the money recovered by the judgment, and this right expires unless enforced in the manner and within the period provided by statute. Having once expired it is incapable of revival, although upon revival of the judgment a new lien may be acquired. But in ejectment it is the right of possession of the land that is recovered by the judgment, and the right thus established is no more extinguished by the lapse of the limitation period for the issuance of execution than is the plaintiff's right to the debt or damages recovered in a money judgment. In either case the right of the prevailing party to the subject-matter recovered continues and is capable of enforcement, in a proper

⁶ See 2 Tidd's Pr. 1102; 2 Sellen's Pr. 204.

mode, so long as the judgment itself is not barred by the statute of limitations.⁷

Where, however, the general law limits the time during which an execution may be issued, and prohibits the enforcement of judgments after the expiration of such period unless the same shall have first been revived, it would seem that a judgment in ejectment would fall within the inhibition and become dormant after the period had passed. Hence, if the plaintiff has neglected to sue out a writ of possession within the time limited for the issuance of executions, it would further seem that in order to avail himself of the benefit of the judgment he must revive it in the manner prescribed by law. When this has been done process may issue as in other cases.⁸ The statute, generally, provides that a judgment of a court of record may be revived at any time within twenty years from the time such judgment was entered.

The proceeding to revive a judgment is not an original suit, but merely a continuation of the suit in which the judgment was rendered,⁹ and the only defense that can be interposed is a denial of the existence of the judgment or proof of a subsequent release.¹⁰ It is usually instituted by a writ of *scire facias*, or its statutory substitute, which should set forth the facts upon which the right to have the judgment revived depends. Where a party, by delaying execution, has suffered his judgment to become dormant a legal presumption is raised against its continued validity, and this presumption must be met and rebutted by showing that there has been no execution of the judgment and that the right thereof still exists.¹¹

§ 502a. **Reversal.**—Where a judgment in ejectment has been reversed on appeal the effect of such reversal is to remit the parties to the same condition which they were in prior to the rendition, and their respective rights remain the same as though the cause had never been heard or decided. If the ac-

⁷ *Smith v. Stevens*, 133 Ill. 183.

¹⁰ *Dowling v. McGregor*, 91 Pa.

⁸ *Bowar v. Railway Co.*, 136

St. 410.

Ill. 108.

¹¹ *Wolf v. Poundsford*, 4 Ohio,

⁹ *State v. Foster*, 7 Vt. 52;

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Eldred v. Hazlett's Adm'r, 38 Pa.

St. 16.

tion is not prosecuted, or if the plaintiff dismisses his suit, nothing can be predicated on the reversed judgment and the matters involved will not be *res judicata*. These are the principles which apply to reversed judgments generally and there is no distinction in this respect between judgments in ejectment and those rendered in other actions.

Where a judgment is thus nullified by the order of a superior court it follows that the successful litigant below can take nothing under it and that he must restore whatever he may have received. If the judgment be for the plaintiff, and he has been let into possession, he must restore such possession,¹² and, it seems, the defendant would also be entitled to the value of the rents and profits which he may have lost while out of possession.¹³

¹² Colburn v. Yantis, 176 Mo. 670.

¹³ Crispen v. Hannovan, 86 Mo. 417.

CHAPTER XIV.

WRIT OF POSSESSION.

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§ 503. Generally considered.—Where the plaintiff has successfully maintained the issue presented by the pleadings, and a judgment has been rendered in his favor, he is entitled to be placed in the actual possession of the lands sued for by the arm of the court. The effective means for the accomplishment of this purpose is generally known as a *writ of possession*.

Under the old practice the restitution of the premises, upon a judgment in ejectment, was accomplished by what was known as a writ of *habere facias possessionem*, which was a judicial writ issuing out of the court in which the action was brought and directed to the sheriff of the county wherein the venue was laid; it recited the judgment and commanded him, without delay, to cause the plaintiff to have possession of his term then still to come off and in the tenements recovered. It lay upon all judgments for the plaintiff, whether against the casual

ejector, tenant, or landlord, and might issue at any time within a year and a day after judgment had been signed. Upon being sued out the writ was delivered to the sheriff who made out a warrant thereon directed to his officer and the sheriff or his officer thereupon delivered possession of the lands recovered, all power necessary for this end having been given him.

In the modern remedy the procedure has not been materially changed and a plaintiff recovering judgment is entitled to execution thereof by a writ of possession, the form of which is usually prescribed by statute. The writ is directed to the sheriff and after reciting the recovery of the judgment commands him, without delay, to deliver to the plaintiff the possession of the premises so recovered, and in addition to collect the costs that may have been taxed in the case. A separate execution may, however, issue for the costs.

The writ of possession is not altogether analogous to a writ of execution, nor do the rights of the plaintiff to the possession depend thereon. The judgment, in itself, binds the land of which the writ directs possession to be delivered and the office of the writ is simply to carry the judgment into effect with reference to such land. Its operation is practically a writ of assistance. The plaintiff has a right to take possession, by virtue of the judgment, without any writ, if he can peaceably do so. In such event the judgment will be sufficient evidence of his right of entry, as between the parties and their privies, and will protect him as long as it continues in effect.¹⁴ Nor is a writ necessary where the defendant quits possession, or has only a technical possession.¹⁵

§ 504. **Requisites of writ.**—The form of a writ of possession is generally prescribed by statute, and, like all statutory writs, a substantial compliance with statutory directions is necessary. If the writ is defective a motion to quash is in order, and it seems that unless such motion is made no error can be assigned for the defect.¹⁶ The land to be recovered

¹⁴ Jackson v. Haviland, 13 Johns. (N. Y.) 229; Witbeck v. Van Rensselaer, 64 N. Y. 27; Bowar v. Railway Co., 136 Ill. 101.

¹⁵ Craft v. Yeane, 66 Pa. St. 210.
¹⁶ Parr v. Van Horn, 38 Ill. 226.

should be fully and properly described,¹⁷ but technical accuracy is not always required and the writ will not be void for uncertainty of description if the land is described so that its boundaries are possible of identification by the sheriff in the field.¹⁸ Like other executory writs it should conform to the judgment,¹⁹ as respects both parties and subject-matter.

§ 505. *Time of issuance.*—By the rules of the common-law action it became necessary, where a judgment for recovery had been entered, for the writ of possession to issue within a year and a day from the time of such entry, and where the plaintiff failed to take same out, within the time thus limited, a revival of the judgment by *si. fa.* was required. This rule seems to have been adopted by analogy to the existing practice in personal actions when the action of ejectment was introduced, and as a reason therefor it was said, that where a plaintiff had lain by so long after judgment it should be presumed that he had released the execution,²⁰ and therefore, the defendant should not be disturbed without being called upon, and having an opportunity in court of pleading a release, or showing cause, if he could, why the execution should not be enforced.²¹ This rule, however, has been generally abolished in the changes to which the action has been subjected and the general rules which regulate the practice in respect to judgments and executions apply to the statutory action of ejectment, in the absence of specific provisions to the contrary.

It is, of course, still necessary that the writ should issue in apt time, but what shall be considered apt time must be determined from the general laws in respect to practice, where the statute is silent, and not from the old rules where they appear to be inconsistent. It has been intimated that where a plaintiff fails to take out his writ of possession for a year after judgment, it is doubtful if he is entitled to it without a special order,²² but this dicta seems to have been but an undefined reflex

¹⁷ Williams v. Kelso, 7 La. Ann. 406.

¹⁸ Lawrence v. Davidson, 44 Cal. 177.

¹⁹ Skinner v. Hannan, 81 Hun. (N. Y.) 376.

²⁰ 2 Tidd, Prac. 1103.

²¹ Bac. Abr., tit. Ejectment; Adams, Eject., sec. 246; 2 Selton's Pr. 204.

²² Oetgen v. Ross, 47 Ill. 142. And see Hess v. Sims, 1 Yerg. (Tenn.) 143.

of the ancient rule respecting laches, and has since been denied.²³ The statute generally provides that the rules of practice in other actions shall have the same force in actions of ejectment, so far as they are applicable, and where the act concerning ejectment makes no provision as to the time within which a writ of possession may issue the general provision for the issuance of executions must prevail. Thus, if the statute with respect to the manner of enforcing judgments provides that execution may issue at any time within a given number of years, this would control and operate as a repeal by implication of the old rule.²⁴ Where the time within which a writ may issue is fixed by law it would seem that the computation should be from the rendition of judgment rather than the day on which the term of court ends.²⁵

§ 506. **Execution of the writ.**—All of the authorities are strenuous in their announcement of the doctrine, that to satisfy the judgment in ejectment there must be a thorough and complete execution of the writ of possession. It is the duty of the sheriff to remove from the lands therein described, and of which possession is to given, all persons found thereon together with their property and effects, and to put and leave the plaintiff in the full, complete and quiet possession thereof.²⁶ Nor will a mere formal delivery of possession satisfy the requirements of the judgment. Such possession must be effectual, and the delivery thereof of such a character as will insure to the plaintiff a peaceable occupation of the land, for, as has been said, to turn out the defendant, and put in the plaintiff, under circumstances which indicate beyond a reasonable doubt that the latter cannot remain in possession, even, for a day, without imminent peril of personal injury, but must, to avoid such hazard, immediately abandon the possession and

²³ *Bowar v. Railway Co.*, 136 Ill. 101.

²⁴ *Bowar v. Railway Co.*, 136 Ill. 101; *Riddle v. Ratliff*, 8 La. Ann. 106; *Shultes v. Sickles*, 147 N. Y. 704.

²⁵ *Bowar v. Railway Co.*, 136 Ill. 101.

²⁶ *Lankford v. Green*, 62 Ala. 314; *Newell v. Whigham*, 102 N. Y. 20; *Gresham v. Thum*, 3 Met. (Ky.) 287. And see *Crocker on Sheriffs*, § 571; 2 *Freeman on Executions*, § 474. But see *Wengert v. Zimmerman*, 33 Pa. St. 508.

give way to the defendant who stands ready to re-enter, is not a complete and effectual execution of a writ.²⁷

Upon this latter point, however, there is some confusion in the authorities. It is generally conceded that the only office of a writ of possession is to reinstate the prevailing party, and this is accomplished when such party has been let into possession by the sheriff. The functions of the writ then cease, and, notwithstanding that an interference with or disturbance of such possession may immediately follow, it does not seem, from some of the decisions, that the reinstated party may call upon the sheriff for assistance under the writ. It is contended that in such cases courts cannot, by the mere issuance of process, maintain successful litigants in the rights accorded to them nor prevent the commission of a trespass,²⁸ nor have they any power, by directions inserted in the writ, to order the sheriff to maintain the party in the possession delivered under it.²⁹

But while we are compelled to admit the general correctness of this doctrine, yet, as has been shown, to satisfy the judgment there must be a thorough and complete execution of the writ, and a merely formal delivery of possession is not such a satisfaction as the law contemplates.³⁰ In other words, the execution of the writ must be effectual and to accomplish this the possession delivered under it must be full and actual, and the plaintiff must be left in the quiet and peaceable possession of the land.³¹ Hence, where the plaintiff is put into possession under circumstances plainly intimating that such possession is but formal and momentary, and he is, in fact, ousted therefrom immediately afterward, this cannot be regarded as an effectual execution of the writ.

§ 507. Continued—Execution without eviction.—It is not necessary, however, that in all cases there should be an eviction of the occupant of the recovered lands, for it will often

²⁷ *Gresham v. Thum*, 3 Met. (Ky.) 287; *Farnsworth v. Fowler*, 1 Swan (Tenn.), 1; *Newell v. Whigham*, 102 N. Y. 20.

²⁸ *Atwood v. State*, 59 Kan. 728.

²⁹ *Atwood v. State*, 59 Kan. 728.

³⁰ *Gresham v. Thum*, 3 Met. 287; *State v. Staed*, 143 Mo. 248; *Huerstal v. Muir*, 64 Cal. 450; *Hessell v. Johnson*, 124 Pa. St. 233.

³¹ *Newell v. Whigham*, 102 Mass. 20.

happen that the writ may be completely and effectually executed without an actual expulsion. The object, and the only object, of the process is to obtain possession. A defendant may yield obedience to the order of the court without a forcible ejection. If he shall quietly surrender possession, or if he expressly acknowledges the right of possession to be in the plaintiff, and this is accepted by the plaintiff, the writ may be returned fully executed notwithstanding there has been no expulsion in fact, for the law requires nothing that is useless or oppressive when the ends of justice can be attained without it.²²

§ 508. **Delivery of possession.**—The manner of executing a writ of possession has been discussed in the foregoing paragraphs, and, as there shown, it is the duty of the sheriff to remove from the premises not only the persons against whom the recovery has been had, but also such of their property as may be found thereon which may not be taken under the writ.²³ When this has been done and the possession become vacant, the plaintiff or his agent may enter, and, having so entered, is then in possession as of right. No formal words or acts seem to be necessary to effect a delivery and it is sufficient that the sheriff by any unequivocal words signifies to the plaintiff that the possession is then at his disposal.

If the land, or any part of it, is unoccupied, it is enough that the sheriff shall go upon same and assume to deliver possession, nor does it appear to be essential in all cases that an entry shall actually be made. This is particularly true where the physical characteristics of the premises recovered do not admit of actual entry.²⁴ In all cases, however, there must be an effective delivery of possession.²⁵

²² *Smith v. White*, 5 Dana (Ky.), 376; *Witbeck v. Van Rensselaer*, 64 N. Y. 27; *Wengert v. Zimmerman*, 33 Pa. St. 508.

²³ *Witbeck v. Van Rensselaer*, 64 N. Y. 27.

²⁴ *Perrine v. Bergen*, 14 N. J. L. 355.

²⁵ A plaintiff in whose favor a writ of possession had been is-

sued rode around the land with the sheriff, who said to him: "Here is your land; I put you in possession;" but the tenants who were in possession were not dispossessed, nor was any notice given them to yield possession. *Held*, not an execution of the writ. *Lankford v. Green*, 62 Ala. 314.

§ 509. **Who may be evicted.**—As a general rule, in executing a writ of possession, the defendant and all members of his family, together with his servants, may be removed from the land.³⁶ So, too, all persons entering upon the premises after suit brought for the recovery of same, and who are in possession in subordination to the defendant, may be removed under the writ against him,³⁷ and, generally, any one who has entered under the defendant or in collusion with him will be bound by the judgment and may be dispossessed.³⁸

§ 510. **Continued—Husband and wife.**—As shown in a previous chapter the action of ejectment will lie in many states at the suit of the wife against the husband, and, as just shown, it is the duty of the sheriff, in executing a writ of possession, to remove the defendant from the premises and deliver the possession thereof to the successful plaintiff. Ordinarily, this would present no difficulties, but where the successful plaintiff happens to be the wife of the defendant the solution of the question is not so clear. It has been held, where husband and wife occupied the same house, the property of the wife, that in ejectment by the wife against the husband, who had assumed possession of the premises and was using it as his own, appropriating the rents and profits and refusing to apply any part of same to the wife's comfort and support, that the wife was entitled to an order for the possession of the property but that the husband could not be ejected from the premises.³⁹ The reason assigned for this ruling is, that to permit the eviction of the husband would establish a precedent dangerous to society, in that it would virtually institute a new form of divorce if the wife, under the forms and with the sanction of law, could, of her own will and without cause, eject her husband from her dwelling and society because the house is her separate property. In the case under consideration the court

³⁶ *Huerstal v. Muir*, 64 Cal. 450; *Fiske v. Chamberlin*, 103 Mass. 495; *Johnson v. Fullerton*, 44 Pa. St. 466.

³⁷ *Ritchie v. Johnston*, 50 Ark. 551, 7 Am. St. 118; *McCreery v. Everding*, 54 Cal. 166; *Hall v.*

Dexter, 3 Sawyer, (C. Ct.) 434; *Rowell v. Klein*, 44 Ind. 290.

³⁸ *Satterlee v. Bliss*, 36 Cal. 489; *Hanson v. Armstrong*, 22 Ill. 442; *Ritchie v. Johnson*, 50 Ark. 551.

³⁹ *Manning v. Manning*, 79 N. C. 293.

solved the question by giving to the husband a right of ingress to the wife's presence but denied to him any dominion over the land or right of occupancy of the house except in conjunction with her.

§ 511. **Who may not be evicted.**—It is fundamental that the judgment in ejectment binds only the parties to the action and those persons who stand in some relation of privity with them. From this it follows that the writ of possession affects those only who are named as defendants or persons who enter under them during the pendency of the suit.⁴⁰ Therefore, notwithstanding a person may have been in possession of the premises, under a claim of title, at the time the suit was instituted, he cannot be dispossessed unless made a party thereto,⁴¹ nor can a person whose possession is distinct from and independent of the parties be evicted under the writ, even though such possession may have been inaugurated after the suit had been commenced.⁴²

This rule, which on its face is eminently just and reasonable, is usually involved in no difficulty in its practical application, but perplexing questions are sometimes presented in the case of persons holding near and intimate relations with the parties. This is well illustrated in a case where a wife sets up a claim of title after judgment has been recovered against the husband. Ordinarily the family of a defendant may be removed under a writ of possession, and this will include not only his wife and children,⁴³ but his servants, and any others who may have been residing with him at the time suit was commenced or afterwards, notwithstanding they may not have been named as parties,⁴⁴ the privity which existed between them and the defendant being sufficient to render the judgment binding upon them.⁴⁵

⁴⁰ See cases cited in foregoing section.

⁴¹ Howard v. Kennedy, 4 Ala. 592; Bushong v. Rector, 32 W. Va. 311; Irving v. Cunningham, 77 Cal. 626; Georges v. Hufschmidt, 44 Mo. 179; Powell v. Lawson, 49 Ga. 290; Hessel v. Fritz, 124 Pa. St. 229.

⁴² Atwood v. State, 59 Kan.

728; Wilson v. State, 115 Ala. 129; Irving v. Cunningham, 77 Cal. 52; Howe v. Butterfield, 4 Cush. (Mass.) 305.

⁴³ Huerstal v. Muir, 64 Cal. 450.

⁴⁴ Saunders v. Webber, 39 Cal. 287; Johnson v. Fullerton, 44 Pa. St. 466.

⁴⁵ Sampson v. Ohleyer, 22 Cal.

But, where a wife, living with her husband upon the premises, claims the title under a right derived from a person other than her husband, it is difficult to perceive wherein her possession differs from that of a stranger. It has been held, in such a case, that it would be the duty of the husband to defend his own possession upon her title, and that, failing so to do, the wife could not, by setting up a title in herself, prevent the execution of the writ.⁴⁶ This view, however, is manifestly opposed to the general theory of the law with respect to the conduct of suits and execution of judgments, and while a husband may resort to his wife's title as a defense, in exactly the same manner as he may show title in a stranger, yet his failure so to do should not preclude the wife's rights any more than it would those of a stranger. The better rule would seem to be that a wife who claims the land as her separate estate, under a title which accrued prior to the commencement of the ejectment suit, may not be dispossessed under a judgment against the husband rendered in an action to which she was not a party.⁴⁷

§ 512. **Persons entering pending suit.**—As we have seen, where a person enters upon land after suit in ejectment has been brought for its recovery, if his possession is in subordination to the defendant he is equally liable to be removed by the writ issued upon the judgment subsequently rendered in the action. But a person thus entering after suit brought, claiming under title previously existing and which is adverse to that of the parties to the suit, is not affected in his rights by the judgment recovered.⁴⁸

When such an entry has been made on embarrassing question is sometimes presented to the officer executing the writ. The determination of the question, whether parties thus entering have such ante-dating title is not left, however, to the judgment of the officer. He has no judicial power to pass upon the rights of strangers whom he may find in the actual occupation of the land, and his duty under the writ requires him to restore

200; *Hanson v. Armstrong*, 22 Ill. 442; *Fiske v. Chamberlin*, 103 Mass. 495.

⁴⁶ *Johnson v. Fullerton*, 44 Pa. St. 466.

⁴⁷ *Bushong v. Rector*, 32 W. Va. 311.

⁴⁸ *Mayo v. Sprout*, 45 Cal. 99.

possession to the plaintiff. In a case of this kind it has been held, that when a person is found in possession, claiming under a title anterior to the suit and adverse to the parties thereto, the officer may require from the plaintiff an indemnifying bond before proceeding to remove the occupant, or, he may give a reasonable time to the occupant to apply to the court for a modification of the writ so as to exclude him from its operation. Upon such application the court may stay the enforcement of the writ or except the applicant from its operation, until the rights of the parties can be properly determined. But when a sufficient bond of indemnity is tendered, and no different order is made in the manner indicated, the duty of the officer is discharged only by placing the plaintiff in possession as directed, and this implies a removal of all occupants.⁴⁹ This seems the only rational way out of a dilemma of this kind, yet, as the writ only authorizes the sheriff to dispossess the defendant and those claiming under him, it follows that if one not a party to the suit and claiming by an independent title is removed under a writ of possession, he will be restored to such possession upon application to the court.⁵⁰

A different question is presented where a person enters into possession under the defendant after the commencement of the suit, and, while so in possession, acquires another title from an independent source. In such event, notwithstanding the occupant claims under an independent title which has never been adjudicated, yet as he entered under the defendant he must abide the result of the action and will not be permitted to tack the title subsequently acquired to the defective title acquired from the defendant, and thus bid defiance to the writ.⁵¹

§ 513. **What may be taken under the writ.**—Primarily the writ of possession is for the purpose of restoring to the successful party the actual possession of the land in contro-

⁴⁹ *Hall v. Dexter*, 3 Sawyer, (C. Ct.) 434. The legal theory is that all who come into possession of land after suit brought are presumed to have come in under the defendant, and hence, if the plaintiff recovers, all must

go out under the writ of possession. *Wetherbee v. Dunn*, 36 Cal. 147.

⁵⁰ *Mayo v. Sprout*, 45 Cal. 99.

⁵¹ *Ritchie v. Johnson*, 50 Ark. 551. .

versy. Indeed this is practically all that the writ calls for, and when the party entitled thereto has actually been invested with such possession the functions of the writ cease. But land is a word of very wide signification and means not only the soil of the earth but the increment to and annexations upon it as well. Hence, the prevailing party will be entitled to the land in the condition it presents at the time the writ is issued and may claim whatever is found upon the land, and actually or constructively annexed to it, as well as the land itself.

§ 514. **Crops.**—In pursuance of the doctrine of the preceding paragraph it has frequently been held that as between the successful plaintiff and the evicted defendant, growing crops are a part of the realty, and belong to such plaintiff.⁵² Indeed this is but a specialization of the fundamental rule that growing crops are a part of the land to which they are attached and unless properly reserved pass with it upon the devolution of title.⁵³ It has further been held that the rule applies to matured crops,⁵⁴ and even to the produce of land which has been severed from the soil, provided the same is still resting on the land.⁵⁵ The reason assigned for this rule would seem to be, that in law the defendant is treated as a trespasser,⁵⁶ and hence without right to plant and harvest a crop. Should he do so, and then be evicted by lawful process, the fruits of his labor pass to the rightful owner of the land. Nor will the fact that plaintiff may have his action for mesne profits in any way affect his ownership of crops grown upon land wrongfully withheld from him, for, as has been well remarked, that rem-

⁵² *Altes v. Hincker*, 36 Ill. 275; *Huerstal v. Muir*, 64 Cal. 450; *McLean v. Bovee*, 24 Wis. 295; *Gardner v. Kersey*, 39 Ga. 664; *Carlisle v. Killebrew*, 89 Ala. 329; *McCaslin v. State*, 99 Ind. 428.

⁵³ *Batterman v. Albright*, 122 N. Y. 484; *Heavilon v. Farmers' Bank*, 81 Ind. 249; *Wooton v. White*, 90 Md. 64; *Reilly v. Carter*, 75 Miss. 798; *Anderson v. Strauss*, 98 Ill. 485; *Beckman v. Sikes*, 35 Kan. 120.

⁵⁴ *McGinnis v. Fernandes*, 135 Ill. 69.

⁵⁵ As where a crop of corn had been cut and placed in shocks on the ground. *McGinnis v. Fernandes*, 135 Ill. 69. And see *McCaslin v. State*, 99 Ind. 428.

⁵⁶ *McLean v. Bovee*, 24 Wis. 295; *Rowell v. Klein*, 44 Ind. 290; *Craig v. Watson*, 68 Ga. 114; *Kimball v. Lohmas*, 31 Cal. 154; *McGinnis v. Fernandes*, 135 Ill. 69.

edy may be wholly unavailing by reason of the insolvency of the defendant.⁵⁷

Nor is it material, in a case of this kind, whether the crops have been planted by the defendant or some person in possession as his tenant. In the latter case the tenant is regarded as a wrongdoer in holding possession and cultivating the land, and notwithstanding he may have acted in good faith his legal standing is no better than that of his lessor.⁵⁸

§ 515. **Continued—Harvested crops.**—On the other hand, while the authorities generally concede the right of a successful plaintiff to have his land with its increment, yet where crops have been harvested before the rendition of judgment it has been held that plaintiff is not entitled to them under a writ of possession.⁵⁹ This line of decisions proceeds upon the well established doctrine that where there has been an actual severance of a crop it is no longer a part of the land; that by the act of severance it becomes personalty, and as such is governed by the rules which apply to chattel property. The rule is always observed in judicial and execution sales,⁶⁰ and by analogy it would seem to apply to recoveries in ejectment. But in reply to this it may be said, that the act of severance is act of trespass, and if the growing crop was the property of the successful litigant the wrongful act of severing it from the soil could not destroy that ownership, and therefore, if the crop is still resting on the ground, notwithstanding it has been severed from the soil, it may be taken under the writ.⁶¹

§ 516. **Continued—Adverse views.**—The statements of the preceding paragraphs are not, however, of universal acceptance. In a number of cases it has been held that crops raised on land by the labor of one in adverse possession under a claim of right, or by his agents, belong to him and are not the property of the rightful owner of the soil.⁶² This rule,

⁵⁷ *McGinnis v. Fernandes*, 135 Ill. 69.

⁵⁸ *Oetgen v. Ross*, 47 Ill. 142; *Wetherbee v. Dunn*, 36 Cal. 147.

⁵⁹ *Page v. Fowler*, 39 Cal. 412.

⁶⁰ *Relly v. Carter*, 75 Miss. 798; *Anderson v. Strauss*, 98 Ill. 485; *Jones v. Adams*, 37 Oreg. 473.

⁶¹ *McGinnis v. Fernandes*, 135 Ill. 69; *McCaslin v. State*, 99 Ind. 428.

And see *McLean v. Bovee*, 24 Wis. 295.

⁶² *Faulcon v. Johnston*, 102 N. C. 264.

however, is usually applied only to the severed, not the growing crop,⁶³ though it would seem that some of the cases maintain that there is no difference, in principle, between the one or the other.⁶⁴ In these cases it is held that the owner of land, who is not in possession, is not entitled to the fruits thereof, and that they cannot be recovered from the disseizee notwithstanding that subsequently, in an action of ejectment, a judgment is rendered in favor of the landowner for the possession of the property. It is contended in support of this position, that the law gives to the plaintiff in ejectment the right to recover from the defendant, either in the same action or in another, the value of the use and occupation of the land, or, in other words, damages for the withholding thereof, and that the owner's remedy is restricted to such recovery.⁶⁵ It cannot be denied that there is much of justice in this view, and if the owner is permitted to recover for the use of his land it seems but right that the defendant should be given the fruits of the land during the period for which a payment is exacted.⁶⁶

§ 517. *Fixtures*.—It is a fundamental principle of the law of real property, that the term land includes not only the soil but everything growing upon it or annexed to it. It is a further general rule that whatever is once annexed to land by the possessor thereof, to be used and enjoyed in connection therewith, becomes a part of the realty and passes with the land on the devolution of title. To these annexations has been given the name *fixtures*.

As between vendor and vendee, the rule for determining what are and what are not fixtures has become fairly well settled, and generally the same tests may be applied to other relations when the title to the land is involved. It would seem, on principle, that the same rules should govern in the case of a successful plaintiff in ejectment as are effective in judicial and execution sales, and that whatever has been annexed to

⁶³ See *Stockwell v. Phelps*, 34 N. Y. 363; *Hartman v. Wieland*, 36 Minn. 223; *Ray v. Gardner*, 82 N. C. 454.

⁶⁴ *Johnston v. Fish*, 105 Cal. 420.

⁶⁵ See *Johnston v. Fish*, 105 Cal. 420; *Stockwell v. Phelps*, 34 N. Y. 363; *Brothers v. Hurdle*, 32 N. C. 490.

⁶⁶ See *Craig v. Watson*, 68 Ga. 114.

the land, either actually or constructively, should pass with it on restitution. As between the owner of land and a trespasser the rule has always been that a permanent annexation becomes a part of the land.⁶⁷

There is no general rule nor are there any certain tests for determining whether an article personal in its nature has acquired the character of a fixture, and the courts now generally hold that the question must be answered in each particular case by the circumstances attending the annexation.⁶⁸ The old doctrine of physical annexation has been abandoned,⁶⁹ and while this is always a circumstance to be considered, it is no longer a criterion. Regard must be had to the chattel itself, its adaptation to the use of that part of the realty with which it is connected, the injury that would result from its removal, and the intention with which it was annexed to the freehold.⁷⁰ Indeed, the intention that it should be a permanent accession is the controlling consideration in questions of this kind,⁷¹ but such intention may always be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexing, the purpose for which the annexation was made, and other circumstances of the case.⁷²

§ 518. Continued—Special instances.—The questions growing out of the subject may further be complicated by the character of the parties. Thus, in the case of a common trespass the owner of the land may take and keep the structures which have been erected thereon during the tortious holding. But, an entry may be made by one without right who yet has

⁶⁷ *Dooley v. Christ*, 25 Ill. 551; *Mathes v. Dobschuetz*, 72 Ill. 438.

⁶⁸ *Coburn v. Litchfield*, 132 Mass. 449; *Strickland v. Parker*, 54 Me. 263; *Thomas v. Davis*, 76 Mo. 72.

⁶⁹ *Meig's Appeal*, 62 Pa. St. 28; *Railroad Co. v. Morgan*, 42 Kan. 23.

⁷⁰ *Potter v. Cromwell*, 40 N. Y. 287; *Thompson v. Smith*, 111 Iowa, 718; *Schaper v. Bibb*, 71

Md. 145; *Aldine Mfg. Co. v. Barnard*, 84 Mich. 632.

⁷¹ *Edwards, etc. Co. v. Rank*, 57 Neb. 323; *Binkley v. Forkner*, 117 Ind. 176; *Tillman v. De Lacy*, 80 Ala. 103; *Hendy v. Dinkerhoff*, 57 Cal. 3; *Fuller-Warren Co. v. Harter*, 110 Wls. 80, 84 Am. St. 867, 85 N. W. Rep. 698.

⁷² *Baker v. McClurg*, 96 Ill. App. 165; *Roseville Mining Co. v. Iowa Mining Co.*, 15 Colo. 29; *Horne v. Smith*, 105 N. C. 322.

the power to make his continued possession rightful. This is seen in the case of a railway company which enters upon land without first acquiring a right thereto by any of the means provided by law. In such event the landowner may recover in ejectment and may also have his damages for use and occupation, but, it seems, may not retain the rails or other structures that may have been annexed to the land.⁷³ One reason for this is that a mere tortfeasor necessarily attaches his structures to the freehold, for he has no less estate in himself, and hence a recovery of the freehold carries with it whatever is upon the land. A railway company takes only an easement, and the structures attached are subservient to the purposes of the easement; therefore as the company does not assume to have the freehold there can be no intention in fact to annex its structures to the freehold.⁷⁴ Another reason is found in the fact, that, notwithstanding the original entry may have been a trespass, yet the company may proceed in due course of law to appropriate the land, and consequently to reclaim and avail itself of the structures placed thereon, and therefore, while the landowner is entitled to redress for his injury, his redress cannot extend beyond his injury, or include the taking of the personal chattels of the company.⁷⁵ This conclusion seems to rest on the theory that the occupation in such a case is for a public use; that the materials are essential for such use, and being intended for the public they cannot, as in a common trespass, be treated as dedicated to the owner of the land.⁷⁶

§ 519. **Return of the writ.**—It is usual for writs of possession to be made returnable as in the case of other final or executory process, and the period allowed for such return usually corresponds with the time prescribed for the return of executions. In view of this provision it has sometimes been contended that the writ could not lawfully be executed after

⁷³ Ill. Cent. R. R. Co. v. Hoskins, 80 Miss. 730, 92 Am. St. 612, 32 So. Rep. 150.

⁷⁴ Justice v. Railroad Co., 87 Pa. St. 28.

⁷⁵ Justice v. Railroad Co., 87

Pa. St. 28; Ill. Cent. R. R. Co. v. Hoskins, 80 Miss. 730.

⁷⁶ In this connection consult Toledo, etc. Ry. Co. v. Dunlap, 47 Mich. 456; Jones v. Railroad Co., 70 Ala. 227; Ill. Cent. R. R. Co. v. Le Blanc, 74 Miss. 650.

the return day. It would seem, however, that formerly such writs had no return day,⁷⁷ and that where, in conformity to the general rules governing executions, a command of return in sixty or ninety days is inserted, such command is directory merely, and the writ may be lawfully executed after the return day.⁷⁸ In any event, it would seem that if the sheriff has begun to execute the writ at any time before it is returnable, he may retain same and complete the service after the return day.⁷⁹

On the other hand, it is held in some states that the direction for return marks the limit of the effective life of the writ and if the sheriff has not commenced its execution prior to the return day he cannot execute it thereafter.⁸⁰

§ 520. **Recalling writ—Order of restitution.**—It will seldom happen that courts will interfere to prevent the execution of their writs, issued after a hearing and determination of the cause, yet it would seem to be the established rule that in the action of ejectment the court which renders the judgment exercises a species of equitable jurisdiction over the writ of possession, recalling it if justice requires,⁸¹ and sometimes, after it has been executed, awarding a writ of restitution.⁸² Thus, if possession has been taken of more land than was specifically recovered, or if a party has been turned out of possession by mistake, or there has been an improper use of the process of the court, or the judgment itself has been attacked, or, generally, if the party applying for the writ of restitution shows meritorious reasons for granting same, the court may exercise the power of recall of the writ of possession and award restitution of the premises, and many cases may be found where this has been done.⁸³ The right to thus recall a writ of posses-

⁷⁷ See Crocker on Sheriffs, § 575.

⁷⁸ Witbeck v. Van Rensselaer, 64 N. Y. 27.

⁷⁹ Prescott v. Wright, 6 Mass. 20.

⁸⁰ Prescott v. Wright, 6 Mass. 20.

⁸¹ Oetgen v. Ross, 47 Ill. 142; Miller v. Vaughan, 73 Ala. 312.

⁸² Jackson v. Hasbrouck, 5

Johns. (N. Y.) 366; Oetgen v. Ross, 47 Ill. 142.

⁸³ See Dawley v. Brown, 43 How. Pr. (N. Y.) 22; Coleman v. Henderson, 2 Scam. (Ill.) 251; Coughanour v. Bloodgood, 27 Pa. St. 285; Hyde v. Boyle, 93 Cal. 1; Smith v. Pretty, 22 Wis. 655; McAndrews v. O'Hanlin, 18 N. J. L. 127.

sion as well as to award a writ of restitution in such cases, unless specifically authorized by statute, seems to arise by equitable construction by the courts, to prevent injury to a party who has been wrongfully dispossessed of the premises; it is not demandable as matter of right, but is awarded as an act of grace and in furtherance of justice where the circumstances seem to warrant it.⁸⁴

A writ of restitution will also be allowed where the judgment on which the writ of possession issued has been reversed on appeal, and while it has been held that this allowance may be made by the appellate court,⁸⁵ the better practice would seem to be that it should proceed from the lower court in which the original judgment was rendered.⁸⁶ It is also proper for a court of equity to order a restoration of possession of the premises where a judgment at law has been set aside for fraud, accident or mistake in its procurement, and to enforce this order a writ of restitution may issue.⁸⁷ But when a court of equity directs a judgment at law in ejectment to be set aside and the possession restored, its jurisdiction is ended. It has no right to retain the case for the purpose of trying the title, where the title is legal and not equitable, and when it has granted a new trial its functions cease and the parties should be left to a court of law for an adjudication of their rights.⁸⁸

§ 521. **Restraining execution of writ.**—It follows from the statements and conclusions of the preceding paragraphs that a person in possession of the lands, who was neither a party nor a privy to the action, may generally protect his possession by a restraining order issued by a court of equity.⁸⁹ Nor does it seem that the fact, that such person has a remedy at law for damages against the sheriff, in any way impairs his

⁸⁴ *Watson v. Trustees*, 37 N. C. 211; *Bowar v. Railway Co.*, 136 Ill. 101.

⁸⁵ *Hall v. Wells*, 54 Miss. 289.

⁸⁶ *Vroman v. Dewey*, 23 Wis. 626.

⁸⁷ *How v. Mortell*, 28 Ill. 478; *Skinner v. Hannan*, 8 Hun (N. Y.), 376.

⁸⁸ *How v. Mortell*, 28 Ill. 478.

⁸⁹ *Charter Oak Ins. Co. v. Cummings*, 90 Mo. 267; *Banks v. Parker*, 80 N. C. 157; *Moulton v. McDermott*, 93 Cal. 660; *Stewart v. Pace*, 30 Ark. 594; *Bushong v. Rector*, 32 W. Va. 311.

right to an injunction.⁹⁰ It has been held in some cases that an injunction will not lie at the suit of persons possessing superior rights who have not been made parties to the action. The reason for this is, that not being parties to the judgment the writ cannot affect them.⁹¹ But generally, if such persons are also in possession of lands in controversy an injunction will be granted to prevent a dispossession under the writ.⁹² If such persons are not in possession there is no occasion to restrain the writ and an application for injunction should be denied.⁹³

§ 522. **Restitution of possession under reversed judgment.**—The general rule is, that whenever a party has been dispossessed by virtue of a judgment, which, for any reason, is subsequently reversed or set aside, the court will at once restore such party to the possession from which he has been evicted and place him, as nearly as may be, in the same condition he was before the process issued.⁹⁴ In such event a writ of restitution will issue as a matter of course, and, usually, unless some new matter has intervened, the court will refuse to entertain any motion or pass upon the further rights of the parties until the possession is restored.⁹⁵

Where only the parties to the action or their privies are concerned the rule seems to be well settled and proceeds upon the theory, that the plaintiff has recovered possession only through the judgment; that the judgment no longer being of any force the property which had been delivered under it can no longer be held by it, and that, the defendant having been put out by process of law, the law must be just to itself, as well as to him, by restoring him to that of which he was wrongfully deprived.

§ 523. **Continued—Where strangers are concerned.**—But while the rule just stated is well settled as of imperative authority it is equally well settled that where persons are peaceably in possession of the premises under title derived from an

⁹⁰ *Williamson v. Russell*, 18 W. Va. 612.

⁹¹ *Jones v. Chiles*, 3 T. B. Mon. (Ky.) 341.

⁹² *Bushong v. Rector*, 32 W. Va. 311.

⁹³ *Tevie v. Ellis*, 25 Cal. 515.

⁹⁴ *Lytle v. Lytle*, 94 N. C. 522;

Hall v. Wells, 54 Miss. 289; *Fish v. Toner*, 40 Minn. 211; *Runyon v. Hall*, 10 Ark. 476.

⁹⁵ *Perry v. Tupper*, 71 N. C. 385.

independent source, they cannot be ejected except as a consequence of a proceeding to which they have duly been made parties, and in which they might have had their day in court and an opportunity to litigate their rights. Hence, the prevailing party in an action of ejectment or other suit to recover possession of real property cannot, by his writ of assistance or restitution, dispossess a stranger to the proceedings holding the land under an independent claim of title and not in collusion with the defeated party.⁹⁶

But to this general rule there are some marked exceptions. Thus, it has no application where the party seeking to be restored to the possession has been wrongfully dispossessed by the agency of the court; as where a party has been ousted by a judgment, which, upon appeal, is reversed and a restitution of possession directed. In such event it is immaterial that the occupant of the land may have gained a peaceful possession under a title which is adverse to both parties to the suit and who is not in collusion with either. The theory in such case is, that the ejected party does not stand in the position of one who seeks the aid of a court to regain a possession lost by his own negligence or misfortune, but, on the contrary, is out of possession only because the court has wrongfully put him out, and whoever is in is there only because the court has wrongfully made room for him. Inasmuch as all that the one has gained and all that the other has lost is due to the agency of the court, therefore, it is said, no injustice is done by restoring the party wrongfully dispossessed without stopping to inquire into or investigate the rights of the party who has thereby gained possession. If he has a superior right to the possession, he can, after going out, assert it with the same effect as if he had never been in, and loses nothing but the advantage of holding the lands pending the litigation,—an advantage to which he was never entitled.⁹⁷

§ 524. *Alias writ.*—Where the judgment of the court has been duly executed by a writ of possession, under which the

⁹⁶ *Mayo v. Sprout*, 45 Cal. 99; *Georges v. Hufschmidt*, 44 Mo. 179; *Krepps v. Mitchell*, 156 Pa. St. 320.

⁹⁷ *Quan Wo Chung Co. v. Lau-meister*, 83 Cal. 384, 17 Am. St. 261. And see *Perry v. Tupper*, 71 N. C. 385.

plaintiff has acquired a full restitution of the premises, can he have recourse to the same judgment for another writ in case of a subsequent invasion of his possessory rights? The question is not without difficulty. It is laid down in the old authorities that if the lessor, after having had possession given to him by the sheriff and before the writ of possession has been returned, is again ousted by the defendant he shall have a new writ, but if he is ousted by a stranger, he must resort to another ejectment. The reason assigned for this distinction is, that in the one case the defendant shall never, by his own act, keep the possession which the plaintiff has recovered from him by due course of law, and in the other, that, as the title was never tried between the plaintiff and the stranger, he may claim the land under a title paramount to that of the plaintiff, and therefore the recovery and execution in the former action ought not to hinder the stranger from keeping that possession to which he may have a right.⁹⁸ But when this doctrine was announced the return of the execution was very much within the discretion of the plaintiff, who was permitted to do whatever seemed most for his own advantage in order to obtain a full benefit of his judgment, and to this end, he was allowed to renew the execution at his pleasure until full satisfaction was obtained. At a later time this doctrine was overruled, and it was held that where the lessor had been put in possession by virtue of a writ, then, notwithstanding the writ had not been returned, if the plaintiff was subsequently ousted and deprived of possession, an *alias* writ would be denied.⁹⁹ It was contended that as possession had been given under the first writ it should have been returned satisfied and that an *alias* cannot issue after a writ is executed.

A survey of the American cases on this subject discloses an adherence to the doctrine last stated. As the writ of possession is now returnable the same as other writs, and no longer rests in the caprice of the plaintiff, it follows that if a writ of execution has been once returned executed, no *alias* writ can issue,¹ for then the due execution is of record and the writ is

⁹⁸ See Adams, Eject. *309.

¹ See Gresham v. Thum, 3 Met.

⁹⁹ Doe v. Roe, 1 Taunt. (Eng. (Ky.) 287.
Com. Pleas) 55.

functus officio.² There may be exceptional cases where an *alias* writ will be allowed,³ but, generally, the rule is as stated.

§ 525. **Entry without writ.**—As before remarked a successful plaintiff has a right of entry by virtue of the judgment and without the writ.⁴ If he finds the lands unoccupied he may peaceably assume possession, and such possession will not be disturbed by legal process while the judgment remains in force.

² See *Hinton v. McNeill*, 5 Ohio, 509; *Fowler v. Currie*, 2 Dana (Ky.), 52; *Gresham v. Thum*, 3 Met. (Ky.) 287.

States v. Slaymaker, 4 Wash. 169; *Dutra v. Pereira*, 135 Cal. 320.

³ See *Jackson v. Hawley*, 11 Wend. (N. Y.) 182; *United*

⁴ *Bowar v. Railroad Co.*, 136 Ill. 101.

CHAPTER XV.

DAMAGES AND MESNE PROFITS.

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§ 526. Generally considered.—The primary object of an action of ejectment is the recovery of land. But it would seem that in its original form substantial damages could also be recovered and the measure of such damages, when the plaintiff recovered his term, was the profits of the land accru-

ing during the tortious holding of the defendant. Upon the introduction of the system of fictions this was abolished and merely nominal damages were assessed, no allowance being made for the real injury sustained by the claimant by reason of his loss of possession. When this change was made it became necessary to provide a further remedy for the actual damages involved, and this was effected by a new application of the common-law action of trespass. This new remedy was called an action for *mesne profits*. In it the plaintiff complained of his ejection and loss of possession, stated the time during which the defendant held the lands and took the profits thereof, and prayed judgment for the damages which he had thereby sustained. This was the form of procedure which for many years prevailed in all of the older parts of the United States, and which, to a limited extent, has been retained in modern practice.

While for many years the successful plaintiff in ejectment was compelled to seek his remedy for damages in a separate action of trespass for mesne profits, this method, after a time, was modified by permitting a recovery of such profits upon a suggestion entered on the foot of the record of the judgment in ejectment, the judgment, in such cases, forming the foundation for subsequent proceedings. This is the method now employed in many of the states. Finally, however, with a view to avoid a multiplicity of suits, this too was abolished in a number of states, and instead of compelling the plaintiff to pursue two actions he is permitted to unite, in the same suit, a claim to recover the land with damages for its detention, and it would seem, where this practice prevails, he has an option to unite the claims in one action or have a separate action, after the recovery in ejectment, for the damages.⁵ The right to damages for withholding possession, which is given by the codes of many of the states, is the statutory equivalent of the old action of trespass for mesne profits given by the common law,⁶ and includes all damages to which the owner is entitled

⁵ See *Livingston v. Tanner*, 12 Barb. (N. Y.) 481; *Holmes v. Davis*, 19 N. Y. 488; *Vandervoort v. Gould*, 36 N. Y. 639; *Walker v. Mitchell*, 18 B. Mon. (Ky.) 541.

⁶ See *Jacks v. Dyer*, 31 Ark. 334.

on account of the wrongful occupation of the premises, as well as for waste committed or suffered by the occupant, as the value of the use and occupation.⁷

In some states, however, a distinction is made with respect to the elements of damage. Thus, while mesne profits may be recovered as damages in the action, on the ground that they are incident to the recovery of the possession, yet damages for waste and injury to the freehold, not being incident to the recovery, are not permitted to be united therewith.⁸ Where this doctrine prevails a count for waste and injury is regarded as a misjoinder of causes of action.⁹ In every instance such right is a distinct cause of action and even though it may be joined with a claim for possession it should be separately stated.¹⁰

Where the plaintiff is permitted to unite claims for the recovery of the land and damages for its detention, it seems that a claim for rents, issues and profits set up in the action for the recovery of the land is a bar to a separate suit for the rents.¹¹

The action for damages has been further complicated in recent years by the very liberal allowances made to occupying claimants for improvements placed upon the land. While the statutes conferring this right bear considerable similarity to each other their interpretation has been far from uniform and the questions that may now be raised are many and perplexing. In the succeeding paragraphs an attempt will be made to state the general doctrines of damages, mesne profits, and allowances for betterments, but, of necessity, the many variations arising from local statutes and their interpretations can be discussed only incidentally.

§ 527. **Costs.**—At common law no damages, except in a few instances, were recoverable in real actions, and hence no costs were allowed to the prevailing party. This was so of the writ of right, and of a number of other actions for which ejectment subsequently became a substitute, and, to a large extent, of the action of ejectment itself. This was largely overcome

⁷ Wythe v. Meyers, 3 Sawyer (C. Ct.), 595.

⁸ Wisdom v. Reeves, 110 Ala. 418.

⁹ Bottorff v. Wise, 53 Ind. 32.

¹⁰ Wythe v. Meyers, 3 Sawyer (C. Ct.), 595.

¹¹ Walker v. Mitchell, 18 B. Mon. (Ky.) 541. And see Bottorff v. Wise, 53 Ind. 32.

at various times by special statutory enactments, but the peculiar character of ejectment and its fictitious parties prevented the taxation of costs in many of its phases. Thus, where the action was undefended, and judgment was entered against the casual ejector, the only remedy which the lessor of the plaintiff had for costs was an action for mesne profits, in which, at the discretion of the jury, they were recoverable as a sort of consequential damages. But where the real party in interest appeared, and entered into the consent rule, costs could be recovered against him in the case of an adverse judgment, or, should he be successful upon the trial he might tax his costs against the plaintiff as in other actions.

In the modern form of the action, even where damages must be sought in the auxiliary proceeding for mesne profits, the judgment providing for the recovery of possession also gives the plaintiff his costs to be taxed. Indeed, the general rule, that the prevailing party shall have his costs applies as well to ejectment as to any other action, and courts award same as of course.¹²

Occasionally a difficult question may be presented, as where the action is discontinued for some matter arising *pendente lite*. Thus, where the defendant, in some lawful manner, has acquired plaintiff's title, and this fact is pleaded as a bar to the further maintenance of the action, it has been held that plaintiff should recover his costs up to the time of the filing of the plea, and that, should such plea be sustained, the defendant should recover his costs subsequently incurred. In such event both parties, for the purpose of taxation of costs, may be regarded as the prevailing party, the practical effect of the plea being to divide the suit into two actions in the first of which the plaintiff is the prevailing party, and entitled to costs, and in the second of which the defendant is the prevailing party, and hence entitled to costs. This, it is claimed, avoids all supposed hardships, and deals out even-handed justice to both parties.¹³ Another difficulty is presented where a defendant disclaims as

¹² *Bachman v. Gross*, 150 Pa. 312; *Lawton v. Gordon*, 37 Cal. 202. But see *Clarke v. Wagner*, 78 N. C. 367. ¹³ *Leavitt v. School District*, 78 Me. 574.

to part of the lands sued for and pleads not guilty as to the residue. In such event notwithstanding a judgment is rendered in favor of the plaintiff for the lands embraced in the disclaimer, yet if the issues are found for the defendant as to the balance of the property, and judgment therefor is rendered in his favor, it is proper to give judgment against the plaintiff for the costs of the suit.¹⁴ This is upon the theory that as the defendant disclaimed title to the land which plaintiff recovered no litigation was had in reference thereto, and as the defendant was successful in the actual issue tried he should have judgment for costs as being the real prevailing party.¹⁵

§ 528. **Nominal damages.**—When the system of fictions was introduced, and actual damages were no longer recoverable in the ejectment suit, it became the custom for the jury to return a verdict for nominal damages in all cases where the plaintiff was found to be the owner of the lands and entitled to possession. This was in obedience to the ancient doctrine that damages were essential to carry costs, and so, when the action was remodeled and the fictions abolished this ancient practice was continued and verdicts for nominal damages were given in all cases of a recovery. This may still be the practice in some states where the action for mesne profits is retained, but, as a general rule, modern statutes make no provision for nominal damages and costs are awarded as of course to the preprevailing party. In some states a successful plaintiff is always entitled to nominal damages where the land was wrongfully withheld,¹⁶ but, generally, an actual damage must be proved, while in some cases, where there has been no actual occupation, damages have been denied.¹⁷

§ 529. **Exemplary damages.**—For waste or other injury to the freehold a separate action is usually required. In some states, however, the statute now permits a recovery of substantial damages for injuries of this character, and in cases of

¹⁴ *Quincy v. Railroad Co.*, 94 Ill. 537; *Tripner v. Abrahams*, 47 Pa. 220. And see *Kansas, etc. Ry. Co. v. McBratney*, 10 Kan. 415.

¹⁵ *Hays v. Tilson*, 18 Tex. App. 610.

¹⁶ *Hahn v. Cotton*, 136 Mo. 216.

¹⁷ *Dobbins v. Baker*, 80 Ind. 52; *Clarke v. Wagner*, 78 N. C. 367; *Griffey v. Kennard*, 24 Neb. 174, 38 N. W. Rep. 791.

wanton aggression exemplary damages may also be awarded.¹⁸ Where this is permitted, proof of actual pecuniary damage is not necessary to entitle the plaintiff to recover.¹⁹ While this looks like a modern innovation, it would yet seem that it was practiced in England from a comparatively early day, for we find in an old case²⁰ a statement that a plaintiff is not confined to mesne profits only but may recover for his trouble. Says the court, "I have known four times the value of the mesne profits given by a jury in this sort of action for trespass. If it were not so, sometimes complete justice could not be done to the party injured." The American cases on this point do not seem to be either numerous or clear.

§ 530. **Action for mesne profits.**—Where damages are allowed in an action for mesne profits according to the old law, the form of the remedy is trespass and the damages are recovered as for a tort. But it would seem that under this practice the lessor in ejectment might, if he saw fit, waive the trespass and recover his damages in an action for use and occupation, limiting his election, however, to the profits which accrued antecedently to the time of the demise in the ejectment. The reason for this was, that the action for use and occupation being founded on contract and the action of ejectment on tort, they were, therefore, wholly inconsistent with each other when applied to the same period of time, as in one action the plaintiff treated the defendant as a tenant and in the other as a trespasser.

But the subtle distinctions of the common-law action, even where the damages are recovered in a separate suit after the issue in ejectment has been determined, are now of comparatively little moment, and the possessor of land, which the true owner eventually recovers, is, in general, chargeable, under the claim of mesne profits, with whatever the same are reasonably worth annually, with interest thereon from the time of ouster to the time of trial. The rule for the measure of damages in such case is generally taken to be the fair rental value

¹⁸ *Herreshoff v. Tripp*, 15 R. I. 92.

²⁰ *Goodtitle v. Tomba*, 3 Will. (Eng.) 118.

¹⁹ See *Hill v. Forkner*, 76 Ind. 118.

of the property, or, if this cannot be ascertained, the fair actual value of the land while in the possession of the defendant, if prudently and judiciously managed.²¹

Where, however, the action is regarded as being for use and occupation, and this is the view now more generally taken, the rule is to limit the recovery to periods corresponding to the statute of limitations. This rule, if applied, would preclude a recovery for more than five or six years prior to the suit.²² In this connection a question is sometimes raised as to the period at which the statute of limitations becomes a bar, that is, whether it is five years before the commencement of the action or five years before the rendition of final judgment therein. and this question is frequently of much importance where long delays have intervened after suit brought. The question has been variously answered and these answers will be considered in detail further on.

In some of the modern codes the ancient term "mesne profits," has been excluded, in obedience to the aggressive spirit of "reform" which now and then manifests itself in different parts of the country. In these codes the rule of damages is stated as the rents and profits, or the value of the use and occupation of the land recovered and this may be regarded as the legislative definition of the old technical term "mesne profits."²³ But even in the states where the term has been discarded by the statute it is still actively employed by both bench and bar, and because it concisely represents a well defined idea in the law of ejectment it will doubtless long remain in popular use.

In assessing the value of mesne profits it has been held, that plaintiff is not restricted to the mere use of the land but is entitled to the rent of the property as improved by the defendant,²⁴ or for the increased adaptation of the land to the occupant's uses, even though brought about by the occupant's own

²¹ *Campbell v. Brown*, 2 327; *Fletcher v. Brown*, 35 Neb. Woods (C. Ct.), 349; *Woodhull* 660; *Knox v. Dunn*, 22 Kan. 683. *v. Rosenthal*, 61 N. Y. 394; ²³ *Wallace v. Berdell*, 101 N. Hodgkins v. Price, 141 Mass. 162. Y. 13.

²² *Ringhouse v. Keener*, 63 Ill. ²⁴ *Miller v. Ingram*, 56 Miss. 230; *Love v. Shartzler*, 31 Cal. 510. But compare *Hodgkins v. 487; Taylor v. James*, 109 Ga. Price, 141 Mass. 162.

labor.²⁵ Further, that mesne profits never should be denied the plaintiff because the defendant, by improving the premises, has made them more valuable than they were when he entered.²⁶ Where the defendant is entitled to the value of his improvements the rule seems eminently just and reasonable, but there are a number of states where it is denied and an assessment of the value of use and occupation must not include the increase in value due to improvements.²⁷ The volume of authority would seem to favor this latter view, but the question is complicated in most states by the provisions of the occupying claimant acts and apparently contradictory rulings will be found growing out of this circumstance.

Where the defendant is allowed compensation for his improvements or the true owner is compelled to pay interest on their value, the rule as first stated would seem to apply.²⁸

§ 531. **When mesne profits may be recovered.**—As the right to mesne profits depends upon the establishment of the right of possession, it follows that an action therefor cannot be maintained until there has been a judicial finding of title, or, in other words, before there has been a recovery in ejectment.²⁹ But where such recovery has been had the right to mesne profits is a necessary consequence,³⁰ and the recovery of nominal damages in the ejectment suit, where this is permitted, in no way affects or impairs the right.³¹

The foregoing remarks must be taken as expressive of the rule in ejectment cases only. It is not contended that rents and profits which may have accrued during an unlawful occupation, and after there has been a re-entry by the rightful owner,

²⁵ *Wolcott v. Townsend*, 49 Iowa, 456.

²⁶ *Gardner v. Grannis*, 57 Ga. 539.

²⁷ See *Wisdom v. Reeves*, 110 Ala. 418; *Hodgkins v. Price*, 141 Mass. 162; *McCarver v. Doe*, 135 Ala. 542; *Walcott v. Townsend*, 49 Iowa, 456; *Curry v. Fish Co.*, 38 Minn. 485; *Davis v. Louk*, 30 Wis. 308.

²⁸ See *State v. Passmore*, 61

Ark. 363; *Childs v. Shower*, 18 Iowa, 261.

²⁹ *Holmes v. Davis*, 19 N. Y. 488; *Bennet v. Bullock*, 35 Pa. St. 367; *Smith v. Benson*, 9 Vt. 138; *Asia v. Hiser*, 22 Fla. 378; *Harding v. Larkin*, 41 Ill. 423.

³⁰ *Lamson v. Ross*, 65 N. Y. 411.

³¹ *Jackson v. Wood*, 24 Wend. (N. Y.) 443; *Fletcher v. Brown*, 35 Neb. 660; *Limberg v. Higginbotham*, 11 Colo. 156.

may not be recovered unless there has been a judgment in ejectment.³² Both the common law and the statute permits a recovery, in some form of action, for an intermediate injury to the freehold by a disseizor and in such cases the plaintiff who has regained possession may have his mesne profits as well as damages for the ouster.³³ But the fundamental idea that is involved in the recovery of mesne profits is the same in every form of action that may be resorted to, and whether the disseizor be treated as a trespasser or a tenant; that is, whether the action be in form a tort, as where trespass is brought, or whether it be in form on contract, as where *assumpsit* is the remedy selected. In either case a rightful possession or re-entry of the plaintiff must first be established before he can call upon the defendant for reimbursement for the tortious holding.

§ 532. **From whom recovery may be had.**—It would seem, at first blush, that the only persons liable for mesne profits are the defeated parties to the action. But while the disseizor is primarily liable,³⁴ so also are those in privity with him whether as tenants or assigns,³⁵ and this although they may have entered in good faith and without actual knowledge of the claimant's rights.³⁶

§ 533. **Limit of recovery.**—At common law the plaintiff was not permitted to take the mesne profits for a longer period than six years before action brought, and should he attempt to extend this time the defendant might plead the statute of limitations.³⁷ The idea involved in this limitation of the time of recovery has been very generally retained in the modern statutory action,³⁸ except that the recovery will usually be allowed for the use and occupation pending suit and up to the time of the entry of judgment.³⁹ The reason for this is obvious, for

³² *Book Co. v. Jevens*, 179 Ill. 71.

³³ *Smith v. Wunderlich*, 70 Ill. 426.

³⁴ *Snell v. Harrison*, 131 Mo. 495, 32 S. W. Rep. 37; *Storch v. Carr*, 28 Pa. St. 135.

³⁵ *Lamson v. Sutherland*, 13 Vt. 309.

³⁶ *Trubee v. Miller*, 48 Conn.

347; *Bradley v. McDaniel*, 48 N. C. 128. But see *contra*, *Fletcher v. McFarlane*, 12 Mass. 43.

³⁷ See *Buller's Nisi Pri.* 88; 1 Chitty, Plead. 225.

³⁸ *Lindenmayer v. Gunst*, 70 Miss. 693; *Ringhouse v. Keener*, 63 Ill. 230; *Tongue v. Nutwell*, 31 Md. 302; *Lopez v. Downing*, 46 Ga. 120.

³⁹ *Hope v. Blair*, 105 Mo. 85;

were the plaintiff restricted to such damages as had accrued up to the time suit was commenced, great hardship, if not positive wrong, would result in many cases. Thus, the suit might be brought within a short time after the wrongful entry, but, from various reasons, it might linger for years before final judgment, and if a recovery could be had only for the rents accruing before the action was commenced it would mean that the plaintiff could recover only nominal damages while the defendant held the land and enjoyed the profits during years of litigation.⁴⁰

The time has also been extended in certain special cases. Thus, where a defendant is allowed a set-off for the value of his improvements it has been held that the plaintiff should be allowed a counter set-off for use and occupation before the commencement of the six years for which there may be a direct recovery.⁴¹

As the proof in ejectment is governed by the same rules that apply in other actions, it follows, in the absence of specific statutory provisions, that if the statute of limitations is not pleaded a recovery may be had for such time as the proof may show that the defendant occupied the premises.⁴² But in most states the statute provides that there can be no recovery for more than six years, and where this is the case the recovery is limited to the statutory period and no necessity exists for pleading the statute of limitations.

§ 534. Continued—Good faith as an element of limitation.—In many states the time during which mesne profits may be recovered is further limited by the real or fancied state of the occupant's mind, as influenced, or supposed to be influenced, by his knowledge of the rights or claims of others. In these states a plaintiff in ejectment is permitted to recover rents and profits for a period previous to the commencement of the action, only when it is shown upon the trial that the defendant had knowledge of the plaintiff's claim.⁴³ This rule

Wisdom v. Reeves, 110 Ala. 418;
Love v. Shartzer, 31 Cal. 487.

⁴⁰ Ringhouse v. Keener, 63 Ill.
230.

⁴¹ Hyatt v. Cochran, 85 Ind. 233.

⁴² See Hill v. Meyers, 46 Pa.
15; Gardner v. Granniss, 57 Ga.
539.

⁴³ Clarkson v. Hatton, 143 Mo.
47.

rests upon the idea of good faith on the part of the occupant. If it is shown that he entered and held in bad faith, then the computation of rents should begin from the time of his entry if within the period prescribed by the statute of limitations; on the other hand, if his entry and occupation was in good faith, then rent should be charged against him only from the time suit was commenced,⁴⁴ or from the time that he received notice of the plaintiff's claim.⁴⁵

The doctrine above presented has been affirmatively declared by statute in a number of states under what are generally known as "occupying claimant's laws." These statutes are usually very favorable to the defendant in ejectment and have done much to unsettle the general rules as formulated by the courts. Under these statutes, where the occupant obtained peaceable possession of land, and claims under a connected title deducible of record, if it is shown that he was without actual notice of an adverse title in like manner derived from records, then no action will lie for rents and profits which accrued prior to the receipt of actual notice of the adverse claim. This notice is given either by bringing suit or by delivering an attested copy of the instruments under which the adverse claim is made.⁴⁶

It will be perceived that there is some confusion with respect to the limit of recovery, and where a recovery of mesne profits can be had only in a supplemental action the question is further complicated. The supplemental action, whatever may be the special procedure, is, in effect, an action of *assumpsit* for use and occupation. It has all of the essential characteristics of a new suit, which must be commenced within a definite time after the recovery in ejectment, and, being substantially a new suit, all pleas in bar of its maintenance should be framed with that view. It follows then, that a defense of the bar of limitation should relate to and be governed by the new proceeding, and that all rents which accrued more than five years, or such other time as the statute may limit, before the commencement

⁴⁴ See *Pugh v. Bell*, 2 T. B. Mon. (Ky.) 125; *Robidoux v. Casseleggi*, 81 Mo. 459.

⁴⁵ *Clarkson v. Hatton*, 143 Mo.

47; *Montag v. Linn*, 27 Ill. 328.

⁴⁶ This is statutory, but the text states the general statutory doctrine.

of the supplemental proceeding will be barred,⁴⁷ while the elements of notice and good faith may still further tend to limit the period of computation.

§ 535. **Suggestion for damages.**—Instead of the action of trespass for mesne profits a statutory remedy is provided in some states whereby the plaintiff seeking to recover such damages is required, within a specified time after the entry of judgment in ejectment, to make and file a suggestion of his claim, which is entered, together with the proceedings had thereon, upon the record of such judgment as a sort of continuation thereof. The practical effect of such suggestion is the institution of a new suit, and the only substantial difference between such suit and the old action for mesne profits is that the latter, being in form an action of trespass, is brought as for a tort, while the statutory remedy is an action of *assumpsit* brought for use and occupation.⁴⁸ The suggestion is required to be substantially in the same form as a declaration in *assumpsit*, and the same rules of pleading are observed as upon declarations in personal actions. The defendant is brought in by summons as in other actions and the cause proceeds in the same manner. This is the form of procedure which, at one time, seems to have been very generally followed in this country, and under which many of the decisions still quoted as authority were made.

The modern codes of civil procedure have to some extent modified the doctrine as just stated, although not affecting its essential character. The general effect and scope of the code system is to reduce the various remedies at common law into one, which is called a civil action, with a uniform method of pleading. The various classes of actions being abolished, together with all peculiarities in the forms of pleading, the remedy for mesne profits naturally falls into the arrangement and becomes the subject of a civil action to which the method of commencing by suggestion is no longer applicable. It would seem, therefore, that in the states where the code system prevails, or where statutes embodying its essential features have

⁴⁷ *Ringhouse v. Keener*, 63 Ill. 230.

⁴⁸ See *Ringhouse v. Keener*, 63 Ill. 230.

been enacted, while a right of action for the recovery of mesne profits is preserved, such action is prosecuted by summons and complaint as in other cases, the complaint, in such event, containing the substance that would have been stated in a suggestion under the former practice.⁴⁹ It would further seem, that, under statutes permitting a joinder of actions, a claim for mesne profits may be prosecuted in an action of ejectment where proper averments for this purpose are inserted in the complaint.⁵⁰ Where this practice prevails the plaintiff may join claims for mesne profits and for damages for withholding the property, and, it seems, may recover mesne profits accruing prior to the conveyance to himself, where the grantor has also assigned to him his right thereto and cause of action therefor.⁵¹

Upon the trial of the issue the burden of proof is upon the plaintiff who must establish the value of the rents and profits by affirmative evidence,⁵² and it seems that in the absence of evidence of the amount of damages sustained a verdict for mesne profits will be set aside.⁵³

§ 536. **Damages in original action.**—In states having a code of procedure similar to or based upon that of the State of New York, where the joinder of several distinct causes of action is permitted, the plaintiff may not only recover the lands sued for, but also damages for the profits of same during the time they have been unlawfully withheld, not exceeding the prescribed period of limitation, and also any special damages claimed in the complaint for injuries to the freehold by waste or otherwise.⁵⁴ Such damages may be found and assessed in the same action in which the right of possession is determined and without resorting to any auxiliary proceeding.⁵⁵ The separate action for the mesne profits, as described in the preceding

⁴⁹ *Holmes v. Davis*, 19 N. Y. 216; *Eaton v. Freeman*, 58 Ga. 488. 129.

⁵⁰ *Cagger v. Lansing*, 64 N. Y. 517; *Martin v. Durand*, 63 Cal. 39; *Hope v. Blair*, 105 Mo. 85. ⁵⁴ *Lord v. Dearing*, 24 Minn. 110.

⁵¹ See *Lord v. Dearing*, 24 Minn. 110. ⁵⁵ See *Vandervoort v. Gould*, 36 N. Y. 639; *Livingston v. Tanner*, 12 Barb. (N. Y.) 481; *Tompkins v. White*, 8 How. Pr. (N. Y.) 520; *Miller v. Ingram*, 56

⁵² *Beckman v. Richardson*, 28 Kan. 648. Miss. 510.

⁵³ *Hahn v. Cotton*, 136 Mo. Miss. 510.

section, may, it seems, still be resorted to as a supplementary remedy, thus giving to the plaintiff an option to unite his claim for the recovery of the land with his claim for damages for its unlawful detention, or, to have a separate action for his damages after his recovery in ejectment.⁵⁶

The object of this would seem to be to avoid a multiplicity of suits and to afford an opportunity for the settlement and determination of the rights of the parties as to the entire subject-matter of the litigation by one judgment. But while this is permissible in practice the identity of the causes of action is not destroyed and unless they are properly pleaded, recovery, as a rule, will be denied.⁵⁷ A claim for the rents and profits remains much as it was at common law and must not be confounded with a claim for damages for withholding the land. The former is in the nature of an *assumpsit* for use and occupation, the latter is quite distinctly an action for a tort, and both forms of action must be specifically pleaded to permit evidence of same upon the trial and to sustain a verdict.⁵⁸

A review of the legislation upon this subject discloses an unmistakable tendency to make one suit suffice for the double purpose of the recovery of the land and recovery of damages. In almost every instance where a statutory action is provided there is a prescription of this character, and usually the damages are to be computed to the time of verdict.⁵⁹ In some instances the recovery of damages must be had in the ejectment suit but, generally, notwithstanding such procedure is permitted, a neglect to take advantage of such provision will not preclude a recovery of the mesne profits in a supplementary suit.

§ 537. Where plaintiff acquires possession pending suit. As the primary object of ejectment is the recovery of possession

⁵⁶ *Vandervoort v. Gould*, 36 N. Y. 639; *People v. Mayor*, 17 How. Pr. 57; *Livingston v. Tanner*, 12 Barb. (N. Y.) 481.

⁵⁷ *Armstrong v. St. Louis*, 69 Mo. 309; *Martin v. Durand*, 63 Cal. 39.

⁵⁸ *Larned v. Hudson*, 57 N. Y. 151.

⁵⁹ This would seem to be the case in Alabama, Arkansas, California, Dakota, Florida, Georgia, Iowa, Kansas, Minnesota, Nebraska, Kentucky, Mississippi, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Virginia, West Virginia and Wisconsin.

it logically follows that its object is practically accomplished if the defendant surrenders possession *pendente lite* and the plaintiff enters upon the land. But, notwithstanding the plaintiff may acquire the actual possession of the premises before trial he yet has a right to recover the mesne profits for the previous unlawful possession,⁶⁰ and the suit may be continued for this purpose. To justify such recovery, however, it is necessary for him to establish his right to possession at the time suit was instituted, and this as fully as if he were prosecuting his action for the sole purpose of obtaining possession.⁶¹ When this is done damages may be assessed covering the rents and profits to the time possession was surrendered.⁶²

§ 538. **Damages on default.**—As a default, in an action of ejectment, admits all the material averments of the plaintiff's declaration, and as there then exists no necessity for having evidence as to title, a judgment for possession may be entered and a writ of restitution awarded. If, however, damages are also sought to be recovered it would seem that the usual suggestion should be filed, upon which a writ of inquiry to assess the value of the mesne profits should be issued. In such event notice of same should be given to the defendant as in other cases.⁶³ Upon the execution of such writ the plaintiff must establish his claim in the same manner as in the ordinary case on issue joined, and the damages are assessed and judgment therefor entered as in other actions.⁶⁴

§ 539. **Defenses.**—Where the suggestion of damages takes the form of an action of *assumpsit* for use and occupation the defendant may plead the general issue of *non-assumpsit*, and under such plea may give notice of such matters as he may rely upon in bar of the claim, except such as were or might have been controverted in the ejectment suit, or he may plead such matters specially. The issues thus made are tried as in other causes. On the trial the plaintiff will be required to establish, and the defendant may controvert, the time when

⁶⁰ *Gilman v. Gilman*, 111 N. Y. 265.

⁶¹ *Carman v. Beam*, 88 Pa. St. 319.

⁶² *Gilman v. Gilman*, 111 N. Y. 265.

⁶³ *Tucker v. Hamilton*, 108 Ill. 464.

⁶⁴ *Carman v. Beam*, 88 Pa. St. 319.

such defendant entered into possession of the premises, the time during which he enjoyed the mesne profits thereof, and the value of such profits; and the record of the recovery in the action of ejectment shall not be evidence of such time.⁶⁵

Where damages are limited to the rents accruing after the commencement of the suit, in the case of an occupancy in good faith, this latter may constitute an element of defense although the *onus* of showing bad faith is generally cast upon the plaintiff.

§ 540. *Measure of damages.*—The general rule for the measure of damages, either in actions of trespass for mesne profits, or by a suggestion filed in the case, or where same are claimed in the original action, would seem to be the fair rental value of the property during the period of the tortious holding.⁶⁶ But, if the possession has been held in bad faith, the account should include not only the rents, revenues and profits actually received but also those which the evidence shows might have been received with ordinary good management. To accomplish this evidence may be offered of rents paid for other lands, adjacent or similarly situated and no better capacitated, and other extrinsic proof may be received of the actual value of the property while in the hands of the defendant.⁶⁷

In taking an account for rents and profits the owner is entitled not only to what the lands were reasonably worth annually, but also to interest thereon to the time of trial.⁶⁸ In arriving at this result the rent or income for each year should be ascertained separately and upon the amount so found for each year the interest should be computed down to the time when the account closes, so that there may be interest upon each yearly sum but no interest upon interest.⁶⁹ In fixing the

⁶⁵ This is statutory, and the rule may vary some in different states. The text states the rule promulgated by the Revised Statutes of New York, and which was subsequently adopted by a majority of the states when the action was remodeled and the fictions abolished.

⁶⁶ *Bradley v. Brown*, 86 Iowa, 359; *Nash v. Sullivan*, 32 Minn. 189, 20 N. W. Rep. 144; *Worth-*

ington v. Hiss, 70 Md. 172, 16 Atl. Rep. 534; *Cutter v. Waddingham*, 33 Mo. 296.

⁶⁷ *Gaines v. New Orleans*, 17 Fed. Rep. 16; *Wallace v. Berdell*, 101 N. Y. 13; *Credle v. Ayers*, 126 N. C. 11, 35 S. E. Rep. 128.

⁶⁸ *Hodgkins v. Price*, 141 Mass. 162.

⁶⁹ *New Orleans v. Gaines*, 15 Wall. (U. S.) 634.

amount of the rental value the basis should be the condition of the land as improved by the defendant,⁷⁰ if it has been so improved, where the defendant is entitled to the value of his improvements.⁷¹

While the statute frequently alludes to the "rents and profits" as the damages to which a successful plaintiff is entitled, yet this does not mean the rents actually received by the adverse holder during the period the land was in his possession. Indeed, it requires no demonstration to show that it would be unjust to confine the owner of the property withheld from him to the rents actually received by the party required to make restitution. It is the value of the use and occupation which forms the true criterion in assessing damages. It is this that the claimant has been deprived of, and for this that he should be made whole.⁷² There may, perhaps, be exceptional cases where the damages will be restricted to the amounts actually received.⁷³ This may occur where the occupation was had in good faith, or where the bad faith of the possessor was merely technical,⁷⁴ while the character and situation of the land may still further tend to reduce the amount of the recovery. Usually, however, the rule as first stated will apply and the fair rental value will constitute the criterion of recovery irrespective of the question of good faith.⁷⁵

But where there has been no adverse possession in fact, that is, where the defendant was not in actual possession and received no profits from the land, as where the premises in controversy are vacant and unproductive, or where they consist of unenclosed and unimproved prairie land, no damages should be awarded for use and occupation.⁷⁶ At all events, in such a case, no more than nominal damages should be allowed.⁷⁷

⁷⁰ *Wolcott v. Townsend*, 49 Iowa, 456. S. C. 528; *Lawrence v. Rector*, 137 U. S. 139.

⁷¹ *Miller v. Ingram*, 56 Miss. 510; *State v. Passmore*, 61 Ark. 363. ⁷⁴ *New Orleans v. Christmas*, 131 U. S. 191.

⁷² *Wallace v. Berdell*, 101 N. Y. 13; *Credle v. Ayers*, 126 N. C. 11; *Bradley v. Brown*, 86 Iowa, 359, 53 N. W. Rep. 268. ⁷⁵ *Bradley v. Brown*, 86 Iowa, 359, 53 N. W. Rep. 268.

⁷³ *See Rabb v. Patterson*, 42 Ind. 52. ⁷⁶ *Griffey v. Kennard*, 24 Neb. 174.

⁷⁷ *See Dobbins v. Baker*, 80

§ 541. **Assessment of damages—Writ of inquiry.**—Where issue is joined on a suggestion of damages the trial proceeds as in other cases and if the issue is found for the plaintiff the same jury should assess his damages to the amount of the mesne profits received by the defendant since he entered into possession of the premises. On the other hand, if no issue of fact be joined on the suggestion, or if judgment thereon be rendered against the defendant by default, on demurrer or otherwise, a writ of inquiry to assess the value of the mesne profits is issued, and notice thereof must be given to the defendant or his attorney, as in other cases. Upon the execution of the writ the plaintiff is required to establish the same matters as in the case of an issue joined, and, as a general proposition, the defendant may still controvert them and interpose any set-off to which he may be entitled, while the jury must assess the damages in the same manner as in the ordinary case. Upon such inquisition, or upon the verdict of the jury in the case of issue being joined, the court renders judgment as in actions of *assumpsit* for use and occupation, and which have the like effect in all respects.⁷⁸

§ 542. **Death of parties.**—The statute now makes provision, in most cases, for the death of parties pending the litigation, and if the plaintiff in ejectment shall die after issue joined or after judgment has been rendered, his personal representatives may enter a suggestion of such death and of the grant to them of letters testamentary or of administration, and may suggest their claim to the mesne profits of the premises recovered, in the same manner and with the like effect as the deceased. Where this is done the same proceedings may be had thereon as though the death had not occurred.

§ 543. **Offsets by defendant.**—As a general rule, in an action for mesne profits, whatever may be the form under which it is prosecuted, the amounts expended by the defendant while in the occupation of the lands for necessary repairs and taxes should be deducted from the gross rental value thereof, and the balance then remaining will constitute the damages

⁷⁸ This is statutory, and while the text states the general statutory procedure, local variations will be found.

sustained by the plaintiff and which he is entitled to recover.⁷⁹ So, too, if the premises have been actually rented during the period of the adverse occupation it has been held that in determining the plaintiff's damage the defendant should be allowed a fair compensation for the necessary time and labor involved in the care and management of the premises, and in the collection of the rents.⁸⁰ This ruling is based on the theory that if the plaintiff had been in possession he would have been obliged to pay such sum for management, or to furnish its equivalent in his own labor and services.

It is a further rule of the common law that everything annexed to a freehold becomes a part thereof and passes with a recovery of it. But, independent of statutes, this rule has been so far modified as to permit the value of defendant's improvements, made in good faith, to be set off against a claim for rents and profits,⁸¹ while in a majority of the states this privilege has further been confirmed by statute. Where this rule obtains a judgment for rents and profits can be reduced or even satisfied out of an award to the defendant for the value of improvements.⁸² The presumption also is, that a person in possession of lands under color of title, who makes improvements thereon, is acting in good faith, therefore, until bad faith is shown, he should be deemed entitled to set-off the value of his improvements against the mesne profits. Such improvements, however, must not only be permanent but must also be of such a character as to add to the future value of the property,⁸³ and when this is the case, their value should be assessed on a basis co-extensive in time with the estimate of rents and profits, which they contributed to produce.⁸⁴ It is held in some cases, however, that the right to set off the value of improvements placed

⁷⁹ *Sample v. Bank*, 5 Sawyer (C. Ct.), 394; *Wallace v. Berdell*, 101 N. Y. 13; *Flint v. Douglass*, 28 Kan. 414; *Blodgett v. Hitt*, 29 Wis. 169; *Ringhouse v. Keener*, 63 Ill. 230. But see *contra*, *Napton v. Leaton*, 71 Mo. 358.

⁸⁰ *Hodgkins v. Price*, 141 Mass. 162, 5 N. E. Rep. 502.

⁸¹ *Effinger v. Hall*, 81 Va. 94.

⁸² *Tice v. Fleming*, 173 Mo. 49.

⁸³ *Stark v. Starr*, 1 Sawyer (C. Ct.), 15; *Lunquest v. Ten Eyck*, 40 Iowa, 213; *Roe v. Malcom*, 39 Ga. 328; *Ringhouse v. Keener*, 63 Ill. 230; *Whitney v. Richardson*, 31 Vt. 300; *Learned v. Corley*, 43 Miss. 687.

⁸⁴ *Johnson v. Futch*, 57 Miss. 73.

upon land more than five years before the commencement of the proceeding is barred by the statute of limitations. It is contended that when the statute is relied upon by the parties it must operate alike with respect to both.⁸⁵

§ 544. Continued—Payment of taxes.—While the authorities are not in accord with respect to allowances for taxes, the better rule would yet seem to be that the taxes paid by the defendant while in possession should be set off against a claim for rents and profits,⁸⁶ and in some states this rule has been confirmed by statute.⁸⁷ The action for mesne profits is given to enable the owner of the soil to have a fair and just compensation for the use of the land, but it was never intended to give him anything beyond this. If the defendant has paid sums of money with which the land stood charged, and for which it would have been sold had such sums not been paid, it is fair to say that such payments were made for the use of the plaintiff and for the preservation of his title. If this be true, then to compel the defendant to pay the value of the use of the land and to refuse to allow him to deduct the taxes he may have paid, is to permit the plaintiff to recover more than the rents and profits. It is for this reason that courts have permitted the taxes to be deducted from the profits, the balance being regarded as the true rental value.

In a number of instances, however, this view has been rejected and the rule denied.⁸⁸ The reasons assigned for such action are various but proceed mainly on the old common-law theory that a person cannot be charged with the repayment of disbursements which he has neither requested nor ratified,⁸⁹ and, to some extent, on the theory that as such payments do not constitute improvements the defendant is not entitled to compensation therefor.⁹⁰

⁸⁵ Ringhouse v. Keener, 63 Ill. 230.

⁸⁶ Ringhouse v. Keener, 63 Ill. 230; McInerney v. Beck, 10 Wash. 515; Vaughn v. Vaughn, 100 Tenn. 282.

⁸⁷ Lothrop v. Michaelson, 44 Neb. 633.

⁸⁸ Garrigan v. Knight, 47 Iowa, 525; Ellsworth v. Freeman, 43 Mich. 488.

⁸⁹ Napton v. Leaton, 71 Mo. 358.

⁹⁰ Curtiss v. Gay, 15 Gray (Mass.) 36.

§ 545. **Continued—Payment of incumbrances.**—It is held in some states that where a possessor of lands in good faith pays money in discharge of an existing incumbrance, without notice of any infirmity in his title, he should be reimbursed the money so paid by the true owner seeking to recover the land from him.⁹¹

§ 546. **Compensation for improvements.**—It is an elementary principle of the law of real property that land comprises not only the soil, of whatever material composed, but also all increments in or upon it and all annexations affixed to it. Under this general definition it follows that where one acquires land he also acquires its increment, as crops, trees, herbage, etc., as well as its annexations, as houses, fences, or other erections. Pursuant to this general doctrine it was uniformly held in the earlier stages of the remedy by ejectment that where the owner recovered possession of his land he took it with all that appertained to it, and this rule seems to have been applied without qualification or exception in the determination of the rights of the successful litigant.

The fundamental idea upon which the common-law rule was based seems to have been, that the rightful owner of land is under no duty or obligation to pay for improvements that were never authorized by him. Notwithstanding such improvements were made in good faith the occupant was presumed to have made them at his own risk, and having been annexed to the freehold they passed with its recovery. The rule of the civil law was more liberal, and permitted one who had made improvements upon land of which he was in possession under the belief that he was the owner, to exact compensation for the value of such improvements, less the value of the use of the land, before he could be compelled to surrender possession. Courts of equity adopted the rule of the civil law and applied it in all cases where the owner of land resorted to equity for the recovery of rents and profits. In time, and through the adoption of some of the principles of equity, the rigidity of the common-law rule was modified, and, as the action for mesne profits was equitable in its nature, the common-law courts came to

⁹¹ Walker v. Lawler, 45 Tex. 532.

permit an unsuccessful defendant to set off or recoup the value of his improvements, made in good faith, as against the rents and profits.⁹² But this seems to have been the limit of common-law clemency, and if the owner on recovery in ejectment made no claim for rents and profits the adverse claimant could obtain no compensation for improvements made while he was in possession,⁹³ or if the value of the improvements exceeded the value of the rents and profits, or damages for the detention of the land, then, for such excess there could be no recovery.⁹⁴ Except as changed by the statute this is still the rule of the law courts, and the doctrine has been frequently applied in recent years.

The courts of equity, however, went much further than this, and, from quite an early day, it seems to have been a settled principle that when a *bona fide* possessor of property has made meliorations upon it in good faith and under an honest belief of ownership, and the real owner has been compelled to apply to equity for relief, the court, in furtherance of the maxim that he who seeks equity must do equity, will compel him to pay for such improvements to the extent that they may have enhanced the value of the land.⁹⁵

§ 547. Continued—Statutory rules.—The doctrine last stated has not only affected the action of the common-law courts, as above indicated, but has exerted a powerful influence upon the legislature as well, and, as a consequence, for many years statutory provisions in most of the states have saved to occupying claimants, in good faith, the value of their improvements upon eviction. These laws are all similar in principle, though differing some in practical methods, and the ideas involved are borrowed largely from the well known doc-

⁹² See *Putnam v. Ritchie*, 6 Paige (N. Y.), 404; *Parsons v. Moses*, 16 Iowa, 444; *Gregg v. Patterson*, 9 Watts & S. (Pa.) 209; *Effinger v. Hall*, 81 Va. 94.

⁹³ *Graeme v. Cullen*, 23 Gratt. (Va.) 296. And see *Putnam v. Tyler*, 117 Pa. 570.

⁹⁴ *Parsons v. Moses*, 16 Iowa, 440; *McCoy v. Arnett*, 47 Ark. 445; *Shroyer v. Nickell*, 55 Mo.

264; *Carter v. Brown*, 35 Neb. 670; *Crawford v. Shaft*, 46 Kan. 704.

⁹⁵ See *Story*, Eq. Jur. 779; *Pom. Eq. Jur.* 1241. Also *Bright v. Boyd*, 2 Story, 605; *Cole v. Johnson*, 53 Miss. 94; *Tongue v. Nutwell*, 17 Md. 212; *McLaughlin v. Barnum*, 31 Md. 425; *Thomas v. Thomas' Ex'r*, 16 B. Mon. (Ky.) 421.

trines of equity relating to notice and estoppel. Indeed, these statutes are strictly equitable in their character.⁹⁶ They provide generally, that where one has entered peaceably upon land, under an apparently clear and connected title, and without notice of any adverse title or claim, and has made lasting and valuable improvements before receiving any notice of a claim or right in conflict with his own, then, in the event of his subsequent eviction the value of such improvements shall be allowed to him.⁹⁷ The underlying principle of these laws, as before remarked, would seem to rest, to some extent, on the equitable doctrine of estoppel, in that they will not permit the true owner of land, who has remained silent when it was his duty to speak, to reap the benefits of the labor and expenditures of others, who, by reason of his silence, have done things which otherwise they might not. Therefore, the law provides that if the owner of land shall stand silent until improvements have been made upon it, under an apparent title, he shall not recover the land, together with the improvements that have made it valuable, without paying for such improvements their just price. This, as we have seen, has always been the rule in equity and the effect of the introduction of the "occupying claimant's law" into the action of ejectment has simply been to reduce a moral duty to a legal obligation.⁹⁸ It is further contended, in support of the rule, that a statutory provision which compels a plaintiff in ejectment to pay for improvements made by the defendant in good faith does not invade the constitutional rights of the individual by making the owner of land pay for improvements he never authorized and to the making of which he never consented. While it may be that he did not expressly consent to the making of the improvements, yet he is presumed to know of his ownership of the property and is further charged with a knowledge of what is being done with respect to it. If he fails to give proper notice of his claim to the person in actual occupancy, and permits him to make valuable

⁹⁶ *Ross v. Irving*, 14 Ill. 171.

⁹⁷ See *Lamore v. Winter*, 13 Ala. 31; *Jones v. Carter*, 12 Mass. 314; *Davis v. Powell*, 13 Ohio, 308; *Ross v. Irving*, 14 Ill. 171;

Walker v. Beauchler, 27 Gratt. (Va.) 511.

⁹⁸ *Griswold v. Bragg*, 6 Fed. Rep. 342; *Dawson v. Grow*, 29 W. Va. 333.

improvements upon the land under a belief of ownership in himself, this must be regarded as a tacit consent and in the event of a recovery a just compensation should be made for the benefits which the real owner subsequently enjoys.²

But where the common law, as previously stated, has not been changed or enlarged by statute the compensation of the occupant is limited by the demand of the claimant,¹ and even where such statutes have been enacted they are generally accorded a strict construction, while the occupant, in order to avail himself of their benefits must be brought fully within their terms.³ Good faith is generally an essential ingredient,⁴ and want of notice is further necessary to establish the fact of good faith.

§ 548. Continued—By tenants.—The rule is fundamental that a tenant can claim no allowance for the value of improvements placed by him upon the demised premises without the landlord's direction or consent, and that such improvements, becoming a part of the freehold, inure to the benefit of the owner of the fee.⁴

§ 549. Continued—By strangers.—The law authorizing an allowance for the value of improvements made by an unsuccessful defendant, being in derogation of the common law, is generally construed strictly. Its object is the protection of the defeated litigant. Hence, he may not recover for improvements not made by himself or the person under whom he claims.⁵

§ 550. Continued—By purchaser pendente lite.—The general rule is that an occupant cannot recover for improvements made after the institution of suit for the recovery of the

²² *Tice v. Fleming*, 173 Mo. 49, 72 S. W. Rep. 689, 96 Am. St. 479.

¹ *Kerr v. Nicholas*, 88 Ala. 346; *Woodhull v. Rosenthal*, 61 N. Y. 382.

³ *King v. Harrington*, 18 Mich. 213; *Wheeler v. Merriman*, 30 Minn. 372; *Lunquest v. Ten Eyck*, 40 Iowa, 213.

⁴ *Holt v. Adams*, 121 Ala. 664; *Wise v. Burton*, 73 Cal. 174.

⁴ *Wolf v. Holton*, 92 Mich. 136, 52 N. W. Rep. 459; *Jones v. Hoard*, 59 Ark. 42, 43 Am. St. 17, 26 S. W. Rep. 193; *Dulaney v. Nolan Co.*, 85 Tex. 225, 20 S. W. Rep. 70.

⁵ *Jenkins v. Means*, 59 Ga. 55; *McLellan v. Omodt*, 37 Minn. 157; *Schetter v. Southern, etc. Co.*, 19 Ore. 192.

land.⁶ From this it logically follows that one who enters under the defendant is estopped to recover, as his position is no better than that of his assignor.

§ 551. **Improvements made under a defeasible title.**—The primary object of the betterment laws is to secure to an occupying claimant the benefits of improvements he may place upon lands under the supposition that he is the unconditional owner. The title contemplated by the statute is one which the occupant believes, and has good reason to believe, is free from doubt, and of whose defects, if there are defects, he has no knowledge and has received no reasonable notice or warning. Such, at least, is the generally received doctrine, although in some cases it seems to have been subject to considerable modification. This being true, it follows that a claim for improvements made by an occupant having full knowledge of the conditions attached to his estate, which are to be performed by himself, and of which there has been a breach by his own voluntary act, cannot be entertained.⁷ In such event, knowing that his title was conditional and his estate defeasible, the evicted claimant should not be regarded as holding under a supposed legal title, within the meaning of the statute relating to betterments, and should be deemed to have made the improvements for which compensation is sought for his own convenience and benefit, and at his own risk.⁸ This is an important modification of the doctrine heretofore stated yet its inherent justness must be apparent even though at times it may seem to work a hardship.

§ 552. **Improvements must be made in good faith.**—The essence of the right to recover the value of improvements on eviction is, that such improvements shall have been made in good faith.⁹ A man is under no moral obligation to pay for

⁶ Haslett v. Crain, 85 Ill. 129; Wells v. Newsom, 76 Iowa, 81; Gaines v. Kennedy, 53 Miss. 103. But see Dorer v. Hood, 113 Wis. 607, 88 N. W. Rep. 1009.

⁷ Walker v. Walker, 63 N. H. 321; Walker v. Arnold, 71 Vt. 263.

⁸ Tripe v. Marcy, 39 N. H. 439; Hughes v. Edwards, 9 Wheat. (U. S.) 489. And see Buell v. Irwin, 24 Mich. 145; Hannan v. McNickle, 82 Cal. 123.

⁹ Carpentier v. Small, 35 Cal. 346; Lee v. Bouman, 55 Mo. 400; Whitney v. Richardson, 31 Vt. 200; Holmes v. McGee, 64 Miss.

unauthorized improvements put upon his own land by a tortious occupant, nor will the law raise a legal obligation,¹⁰ and where a defendant has knowledge of all the facts which invalidate his claim, notwithstanding he may entertain an erroneous belief that his title is unimpeachable, he is not such a *bona fide* holder as will entitle him to compensation for the improvements he has made.¹¹

What is good faith, in matters of the kind now under discussion, cannot be reduced to fixed terms. It is not to be determined by what the party may have believed or disbelieved, but what the jury, or the court acting in lieu of a jury, ought to believe and find from the evidence.¹² If the triers are satisfied that the party had good reason to believe, or had ready means for discovering, that his title was void, this is sufficient to work a denial of any compensation for improvements. In such a case it is immaterial that he had no actual knowledge of the plaintiff's claim provided he had full means for acquiring such knowledge.¹³

§ 553. Improvements made after notice of plaintiff's claim.—As previously shown, to enable one who has been evicted from the possession of land to recover compensation for permanent improvements made during the continuance of such possession, the occupation must have been in good faith. Indeed, this seems to be the indispensable requisite to recovery. The occupant must have an honest belief in the validity of his title, and, it would seem, must have reasonable grounds for that belief,¹⁴ He should not only believe that he is the true owner,

129; *Bryan v. Uland*, 101 Ind. 481.

¹⁰ *Woodhull v. Rosenthal*, 61 N. Y. 382; *White v. Moses*, 21 Cal. 34.

¹¹ *Holmes v. McGee*, 64 Miss. 129; *Harrison v. Fleming*, 7 Mon. (Ky.) 537; *Dawson v. Grow*, 29 W. Va. 333, 1 S. E. Rep. 564; *Hunt v. Pond*, 67 Ga. 578; *Gordon v. Tweedy*, 74 Ala. 232; *Bryan v. Uland*, 101 Ind. 477; *Brown v. Baldwin*, 121 Mo. 106.

¹² *Dawson v. Grow*, 29 W. Va. 333.

¹³ *Woodhull v. Rosenthal*, 61 N. Y. 382; *Barlow v. Bell*, A. K. Marsh. (Ky.) 246; *Wood v. Krebs*, 33 Gratt. (Va.) 685.

¹⁴ *Richwine v. Church*, 135 Ind. 80, 34 N. E. Rep. 737; *Dohan v. Murdock*, 41 La. Ann. 494, 6 South. Rep. 131; *Holmes v. McGee*, 64 Miss. 129, 8 South. Rep. 169; *White v. Stokes*, 67 Ark. 184, 53 S. W. Rep. 1060; *Horton v. Sledge*, 29 Ala. 478; *Sartain*

but, in addition, should be ignorant that his title is denied or liable to be contested by one having or claiming a better right,¹⁶ or, if so informed, should have strong grounds for believing that such adverse claim is destitute of legal foundation.¹⁶ But mere belief, however strong, is not in itself sufficient, for the real question is not what a party may have believed but what he should have believed. Were the rule otherwise then the statute could be rendered nugatory in every case where the occupant purposely shuts his eyes to all the means of information or refuses to believe all evidence that tends to impeach his title.¹⁷ Hence, if he improves the land with notice of an adverse title or with knowledge of the rights of the plaintiff, it would clearly be unjust to award him compensation for such improvements so made.¹⁸

In some states the rule is strongly asserted that the occupation must be under color of title,¹⁹ and, save in exceptional cases, mere equities will be insufficient to warrant an allowance for improvements,²⁰ but, in any event, there must be a claim of title under an honest belief of its validity.²¹ It has been held that if a person buys land without an examination of the records, which, if duly made would have revealed an infirmity of the title he is purchasing, such person is not, as against the true owner, a purchaser in good faith.²² But this doctrine,

v. Hamilton, 12 Tex. 219; Parrish v. Jackson, 69 Tex. 614, 7 S. W. Rep. 486.

¹⁶ Hall v. Hall, 30 W. Va. 779; Bank v. Hudson, 111 U. S. 66; Linthicum v. Thomas, 59 Ind. 574.

¹⁸ Parish v. Jackson, 69 Tex. 614, 7 S. W. Rep. 486.

¹⁷ Dawson v. Grow, 29 W. Va. 333.

¹⁸ Holmes v. McGee, 64 Miss. 129; Brown v. Baldwin, 121 Mo. 106; Green v. Biddle, 8 Wheat. (U. S.) 1; White v. Moses, 21 Cal. 34; Porter v. Doe, 10 Ark. 186; Southerland v. Merritt, 120 N. C. 318; Gordon v. Tweedy, 74 Ala. 232; Bryan v. Uland, 101 Ind. 477.

¹⁹ Snell v. Mechan, 80 Iowa, 53, 45 N. W. Rep. 398; Thomas v. Thomas, 69 Miss. 564, 13 South. Rep. 666; Hall v. Torrens, 32 Minn. 527, 21 N. W. Rep. 717; Beard v. Dansby, 48 Ark. 183, 2 S. W. Rep. 701.

²⁰ Wheeler v. Merriman, 30 Minn. 372, 15 N. W. Rep. 665; Anderson v. Williams, 59 Ark. 144, 26 S. W. Rep. 818.

²¹ Kendall v. Tracy, 64 Vt. 522, 24 Atl. Rep. 1118; Carter v. Brown, 35 Neb. 670, 53 N. W. Rep. 580; Cain v. Cox, 29 W. Va. 258, 1 S. E. Rep. 298; Wood v. Conrad, 2 S. Dak. 334, 50 N. W. Rep. 95.

²² Parrish v. Jackson, 69 Tex. 614, 7 S. W. Rep. 486; Dohan v.

while strictly in accord with the spirit of the recording acts, seems to have been greatly modified in some states so far as it may affect the right of recovery for betterments, and it would seem that notwithstanding a diligent search might have shown the purchaser that he was without title, yet this does not necessarily negative good faith in his occupancy.²³

As a general rule, no compensation should be awarded to an occupant for improvements made after knowledge of the fact that he is not the owner of the land, as such improvements cannot be said to have been made in good faith,²⁴ and a still stronger case for such denial is presented where information is brought home to him that his title is disputed.²⁵

§ 554. **Continued—Statutory notice.**—In the absence of legislation upon the subject the usual common-law tests must serve to fix the fact of notice and its attendant incidents. In some states, however, the legislature has assumed the duty of defining the character of the notice that will affect the party in possession. Where the statutory notice has been given, a further procedure is also generally provided for the assessment of damages and the sum to be allowed for improvements. This assessment is made by commissioners appointed for the purpose and the methods are too various to be profitably reviewed in a work of this kind. Where this method of assessment is permitted the procedure does not seem to be altogether well settled. The method is distinctly an innovation, in that it removes the computation of damages and assessment of improvements from the domain of the jury and vests the power in a new tribunal. It seems to have been borrowed from the procedure of courts of equity and does not seem to be much resorted to in actions of a purely legal character.

§ 555. **Improvements made after action commenced.**—If compensation for improvements should be denied to one who has notice of a claim superior to his own, it follows with

Murdock, 41 La. Ann. 494, 6 South. 131; Dawson v. Grow, 29 W. Va. 333, 1 S. E. Rep. 564. Baxter, 93 N. C. 405; Cole v. Johnson, 53 Miss. 95.
²³ Petit v. Railroad Co., 119 Mich. 492, 78 N. W. Rep. 554, 75 Am. St. 417; Whitney v. Richardson, 31 Vt. 300; Justice v. ²⁴ White v. Stokes, 67 Ark. 184, 53 S. W. Rep. 1060; Dawson v. Grow, 29 W. Va. 333.
²⁵ Horton v. Sledge, 29 Ala. 478.

stronger reason that no allowance therefor should be made to a defeated defendant where the improvements in question were placed upon the land after the commencement of an action for its recovery. The justness of this rule has many times been recognized by courts and has further found expression, in some states, by statutory enactment. The reason of the rule would seem to be, that no man has a right to choose the mode of improvement of another man's property against his known will, and, therefore, the law will not compensate him in such a case at the hazard of doing wrong to the owner.²⁶ It would seem, however, that this principle does not extend to the payment of taxes and that moneys expended for this purpose may be recovered.²⁷ In some states this right is confirmed by statute,²⁸ and in others it has been denied.²⁹

§ 556. Continued—Opposite views and conflicting rules.

While the rule which denies compensation for improvements made after notice of plaintiff's claim, or after action has been brought, would seem to be well founded in legal reason, it has yet been refused operation in some states, and a *bona fide* occupant of land, under color of title, is permitted to recover for improvements made after, as well as before, the commencement of an action by which he is evicted. The reasoning of the cases which sustain this latter rule proceeds on the general doctrines of adverse possession. The contention is, that it is the entry upon possession under color of title, asserted in good faith, which creates the right to recover for improvements on subsequent eviction; that it is not necessary that the person making the entry should believe his title superior to every other title or claim to the property at the time of such entry, in order to make his possession adverse, and that a subsequently acquired knowledge that there is a better title in some other person does not necessarily change the nature of his occupancy from an adverse possession to a possession subordinate to some

²⁶ Gordon v. Tweedy, 74 Ala. 232; Wells v. Newsome, 76 Iowa, 81; Morrison v. Robinson, 31 Pa. St. 456; Haslett v. Crain, 85 Ill. 129; Gaines v. Kennedy, 53 Miss. 103.

²⁷ Gordon v. Tweedy, 74 Ala.

232; McInerny v. Beck, 10 Wash. 515.

²⁸ Lothrop v. Michaelson, 44 Neb. 633.

²⁹ Garrigan v. Knight, 47 Iowa, 525; Napton v. Leaton, 71 Mo. 358.

other title.³⁰ Hence, it has been held that a notice of claim of superior title, or the commencement of an action to recover the land, does not, in itself, interrupt the adverse possession of a defendant, or change his attitude in regard to his adverse claim,³¹ and that he is entitled to the value of improvements made by him even after notice of the plaintiff's claim.³²

The gist of the right of compensation for improvements seems to be the fact of good faith on the part of the occupant. All of the authorities seem to sustain this principle. The difficulty seems to lie in the definition of good faith. Now this is one of the terms which the law has refused to define, for much the same reasons that it has refused to define "fraud," and other kindred abstractions. Nor have the legal lexicographers been able to give us any very satisfactory definition. In a general way we may say it implies an honesty and sincerity of purpose and an absence of dishonesty, insincerity, etc., but this is about as far as we can go. When applied to a defendant in ejectment its essential elements would seem to consist of an honest belief in the rightfulness of his holding and an absence of such knowledge as would induce a doubt of same in the mind of a reasonable man.³³ Hence, it would seem, on principle, that when he has notice of outstanding title in some person claiming a better right, his occupancy, to that extent, becomes *mala fide*,³⁴ and, in such event, he should be refused an allowance for improvements made after such notice was received.³⁵ Yet, as we have just seen, this doctrine, in a number of states is denied effect.

The uncertainty which attends this branch of our subject is created more by the provisions of positive statutes than by the

³⁰ See *Dothard v. Denson*, 72 Ala. 541; *Barrett v. Stradl*, 73 Wis. 385; *Russell v. Mandell*, 73 Ill. 136; *McCagg Heacock*, 42 Ill. 157.

³¹ *Zwietusch v. Watkins*, 61 Wis. 615; *Langford v. Poppe*, 56 Cal. 73; *Ferguson v. Bartholomew*, 67 Mo. 212; *Workman v. Guthrie*, 29 Pa. St. 495.

³² *Barrett v. Stradl*, 73 Wis. 385.

³³ *Tolbert v. Horton*, 31 Minn. 521.

³⁴ See *Bank v. Hudson*, 111 U. S. 66; *Richwine v. Church*, 135 Ind. 80, 34 N. E. Rep. 737; *Dohan v. Murdock*, 41 La. Ann. 494, 6 So. Rep. 131.

³⁵ *Holmes v. McGee*, 64 Miss. 129, 8 So. Rep. 169; *White v. Stokes*, 67 Ark. 184, 53 S. W. Rep. 1060; *Horton v. Sledge*, 29 Ala. 478.

interpretation and application of the equitable rules which underlie it, and the conflicting decisions found in the books are attributable, in large measure, to this cause. Special statutes designed to protect occupying claimants are now in force in a majority of the states, and while they all unite in declaring that the occupation must have been taken and the improvements made in good faith, it is yet extremely difficult, if not impossible, to reconcile the provisions of many of these statutes with the received rules of equity respecting good faith. By statute, in some states, one who makes improvements on land after notice of plaintiff's claim is regarded as acting in bad faith and is therefore entitled to no compensation for any melioration he may have effected after such notice was brought home to him. This seems eminently just and is in consonance with sound equitable doctrine. As has been well said, it would be manifestly unjust to the owner, and a highly dangerous policy, to make allowances for improvements to one who made the expenditures with a full knowledge of superior rights.³⁶ Where this doctrine prevails the occupant acts at his peril. In other states, however, it is expressly provided that a defendant in ejectment, against whom a recovery has been had, may be allowed for his improvements made after notice of the plaintiff's claim, where he entered into possession under color of title asserted in good faith. These statutes, as well as the decisions that have been made under them, are based on legal rather than equitable principles, and, as has been shown, proceed upon the theories of adverse possession. The adverse holding, it is contended, justifies the expenditure, and to change the nature of the adverse possession, with its resultant right of compensation, there must not only be a knowledge that there is a better title, but, in addition, there must be an express or implied yielding to such superior title.³⁷

§ 557. **Character of improvements.**—With respect to the character of the improvements for which an evicted tenant may recover compensation there would seem to be a wide diversity of opinion. As a general definition we may say that

³⁶ *Linthicum v. Thomas*, 59 385, 9 Am. St. Rep. 795, 41 N. Md. 583. W. Rep. 439. And see *Templeton*

³⁷ *Barrett v. Stradl*, 73 Wis. v. Lowry, 22 S. C. 389.

an improvement is anything that enhances the value of the land,³⁸ and this is about as far as we may proceed with any degree of certainty. But to bring an improvement within the purview of the law respecting compensation it must be of a permanent character, affecting not only present worth but future values,³⁹ and to this extent and for the purposes of our inquiry we may enlarge the definition just given. Within this broad definition courts have taken a wide range in the enumeration of improvements and we find that almost every form of expenditure, either of labor or capital, has been held to conform to the general notion involved. Thus, the digging of ditches,⁴⁰ the erection of fences,⁴¹ the clearing of land,⁴² the planting of trees,⁴³ as well as the building of houses,⁴⁴ have all been classed as improvements when their tendency has been to enhance the value of the land.

As a general rule whatever comes within the character of what is popularly known as a betterment will be sufficient to sustain a claim for compensation. This, in general terms, means something done to or put upon the land by the occupant in such a manner that it cannot be removed or carried away by him, either because it has become physically impossible to separate it from the land, or because, in contemplation of law, it has become so annexed to the soil as to be a part of the freehold. The test, therefore, would seem to lie in the fact of severability without injury to the land, and whatever is capable of being removed by the occupant upon eviction is not an improvement for which an allowance can be made.⁴⁵

³⁸ *Parker v. Wulstein*, 48 N. J. Eq. 94, 21 Atl. Rep. 623; *Bacon v. Thornton*, 16 Utah, 138, 51 Pac. Rep. 153; *Bond v. Hill*, 37 Tex. 626; *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. 891.
³⁹ *Clewis v. Hartman*, 71 Ga. 810; *Stark v. Starr*, 1 Saw. (C. Ct.) 15; *Hicks v. Blakeman*, 74 Miss. 459, 21 So. Rep. 7; *Lathrop v. Michaelson*, 44 Neb. 633, 63 N. W. Rep. 28; *Effinger v. Kenney*, 92 Va. 245; *Reynolds v. Reynolds*, 55 Ark. 369.

⁴⁰ *Beard v. Morancy*, 2 La. Ann. 347.

⁴¹ *Craskery v. Busch*, 116 Mich. 288, 74 N. W. Rep. 464.

⁴² *Craskery v. Busch*, 116 Mich. 288, 74 N. W. Rep. 464.

⁴³ *Donehoo v. Johnson*, 113 Ala. 126, 21 So. Rep. 70.

⁴⁴ *Schmidt v. Armstrong*, 72 Pa. St. 355.

⁴⁵ *Stark v. Starr*, 1 Saw. (C. Ct.) 15.

§ 558. Measure of compensation.—As previously stated the general rule is, that compensation for improvements will only be allowed where the melioration, of whatever consisting, is permanent in its character and calculated to enhance the value of the land. The true measure of recovery, therefore, is not the cost of the improvement but the enhanced value which such improvement may have given to the land.⁴⁶ To ascertain the just sum to be allowed it will be necessary to show the value of the land in its original condition and its value after the improvements had been made upon it, the difference, in such case, being the just amount for which a recovery should be permitted by the defendant.⁴⁷ The enhanced value of the land, arising by reason of such improvements, should be determined only by the ordinary considerations that would apply to lands similarly situated, and not by any special advantages it may possess for the occupant or any particular worth it may have for the plaintiff in view of the purposes to which he intends to devote it.⁴⁸ Thus, it must frequently happen that improvements are made at large cost, that, for the special purpose for which they are designed may be of great value, and yet, the actual value of the land is not materially enhanced thereby. Under such circumstances it is clearly apparent that to compel the successful litigant to pay the cost of such improvements would be most unjust. On the other hand, it has been held that under these remedial statutes a defendant cannot be denied all relief merely because the improvements are not adapted to the use to which the plaintiff intends to devote the land.⁴⁹

⁴⁶ *Harman v. Harman*, 54 S. C. 100, 31 S. E. Rep. 881; *Bacon v. Thornton*, 16 Utah, 138, 51 Pac. Rep. 153; *McMurray v. Day*, 70 Iowa, 671, 28 N. W. Rep. 476; *Conlan v. Sullivan*, 110 Cal. 624, 42 Pac. Rep. 1081; *Cleland v. Clark*, 123 Mich. 179, 81 N. W. Rep. 1086, 81 Am. St. 161; *Williams v. Vanderbilt*, 145 Ill. 238, 34 N. E. Rep. 476, 36 Am. St.

Rep. 486; *Fletcher v. Brown*, 35 Neb. 660.

⁴⁷ *Thomas v. Quarles*, 64 Tex. 491; *Hicks v. Blakeman*, 74 Miss. 459; *Lathrop v. Michaelson*, 44 Neb. 633.

⁴⁸ *Pettit v. Railroad Co.*, 119 Mich. 492, 75 Am. St. Rep. 417, 78 N. W. Rep. 554; *Stark v. Starr*, 1 Sawy. (C. Ct.) 15; *Bacon v. Thornton*, 16 Utah, 138.

⁴⁹ *Pettit v. Railroad Co.*, 119 Mich. 492.

§ 559. Continued—Assessment by commissioners.—As noticed elsewhere, provision is made in some states for the ascertainment of the value of improvements by commissioners appointed for that purpose by the court. The right is made to depend upon a variety of requirements and the procedure does not seem to be much employed. To avail himself of the benefits of this act the defendant must show a plain, clear and connected title in law or equity, deduced from the record of some public office, and must further show that he was without actual notice of adverse title. The act is generally construed strictly and the defendant is required to bring himself fully within the letter of the statute.⁵⁰ Where an assessment is permitted by a jury, either in the ejectment suit or in a subsidiary proceeding, this is the method usually followed. In states where either method may be resorted to it does not seem that an assessment by commissioners is much in favor and there is a positive dearth of judicial decision relating thereto.

§ 560. Crops.—The general rule is that growing and unsevered crops, or the annual produce of land, are a part of the land itself and hence included in a recovery of it. The subject is discussed in another place and will be considered in this connection only as it may be related to our special subject of damages. There are cases which make a distinction between a trespasser and one who enters under a claim of right and holds adversely to the true owner, and which accord to the latter rights which are denied to the former. Usually, however, the growing crops go with the land as an integral part thereof and the main interest centers upon the ripened or harvested crop.

The theory of damages in the action of ejectment is, that it is a recovery, either in the same action or another, of the value of the use and occupation of the land during the period it has been withheld. The recovery is usually of the "rents and profits", but this does not mean the value of the crops raised and harvested but the value of the use of the land. While it may, perhaps, be said that the annual crops represent the value of the use of the land yet they also represent the labor

⁵⁰ See *Mettler v. Croft*, 39 Ill. App. 193.

of the farmer, and to give the true owner the gross product of the land, irrespective of the labor and expense involved in such product, would be manifestly unjust.⁵¹ Therefore, it has been held, that while the title to the land in undetermined the owner thereof out of possession is not entitled to the fruits of the land, nor can he, after he has established his right to the possession, recover the same from an occupant while such occupant was in the adverse possession.⁵² The measure of his damages to be recovered is not the value of the crops raised and harvested, but the value of the use and occupation of the land.⁵³

The elementary rule is, that if a crop has actually been severed it becomes personal property and does not pass to one who afterward acquires title to the land.⁵⁴

§ 561. *Effect of supersedeas bond.*—Upon appeal or writ of error it is customary for the appellant to give a bond conditioned for the payment of damages and costs in the event that the judgment below shall be affirmed. Where such bond operates as a *supersedeas* a question arises as to whether it covers the value of the use and occupation, or the rents and profits of the lands, subsequent to the rendition of judgment in the trial court and before affirmance. It has been held in foreclosure cases that such a bond does not cover rents and profits of the land in controversy which accrue pending appeal, and it has been intimated that the same rule might apply in ejectment cases.⁵⁵ But this doctrine was afterward rejected in the court where it was announced. When judgment is entered in the action the right of the prevailing party to the possession of the property is established. If such party is the plaintiff he be-

⁵¹ *Johnston v. Fish*, 105 Cal. 420; *Stockwell v. Phelps*, 34 N. Y. 363. And see *Ray v. Gardner*, 82 N. C. 454; *Brothers v. Hurdle*, 10 Ired. (N. C.) 490; *Nash v. Sullivan*, 32 Minn. 189.

⁵² *Page v. Fowler*, 39 Cal. 412; *Faulcon v. Johnston*, 102 N. C. 264; *Hartman v. Wieland*, 36 Minn. 223.

⁵³ *Stockwell v. Phelps*, 34 N. Y. 363; *Brothers v. Hurdle*, 32 N. C. 490.

⁵⁴ *Jones v. Adams*, 37 Oreg. 473, 82 Am. St. Rep. 766; *Reilly v. Carter*, 75 Miss. 798; *Anderson v. Strauss*, 98 Ill. 485.

⁵⁵ *Omaha Hotel Co. v. Kountze*, 107 U. S. 378.

comes entitled to immediate possession of the land and to the rents and profits that thereafter shall arise therefrom. If by proceedings in error or by appeal he is deprived of that possession, and so, pending the appeal loses such rents and profits, he is damaged to that extent and may recover whatever is shown to have been so lost under the condition of the bond.⁵⁶

⁵⁶ St. Louis Smelting, etc. Co. v. Wyman, 22 Fed. Rep. 184.

CHAPTER XVI.

NEW TRIAL.

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| <p>§ 562. Generally considered.
563. At common law.
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§ 562. Generally considered.—Under the old practice a judgment in ejectment was very unsatisfactory. The defeated party, whether claimant or defendant, was always at liberty to bring a new action, and, from the structure of the record, it was impossible to plead a former recovery in bar of the second suit as the plaintiff was only a fictitious person and the demise could be laid in so many different ways that it never could be made to appear that the second ejectment was brought upon the same title as the first.⁵⁷ It will be seen, therefore, that the judgment never could be final and about the only permanent relief which a successful party could obtain was by a perpetual injunction against the defendant, and even this could be procured only in exceptional cases. The general rule was that a recovery in ejectment was not conclusive upon the defendant or those claiming under him.⁵⁸

In time, however, as the action came to be regarded as a suit for the establishment of title as well as for the recovery of possession, the vexatious privilege of unlimited litigation was abridged, and by statute but one new trial was permitted, as of

⁵⁷ See *Jackson v. Tuttle*, 9 Cow. (N. Y.) 233; *Ives v. Lett*, 14 Serg. & R. (Pa.) 301; *Pollard v. Baylords*, 6 Munf. (Va.) 433.
⁵⁸ *Hopkins v. McLaren*, 4 Cow. (N. Y.) 667.

right, and when two verdicts of the same tenor had been returned the judgment rendered thereon was taken to be conclusive. This is the declared policy of a number of states and while it rests on but little legal reason, in view of present conditions, it has become so firmly established that it will probably long remain.

In a few states no distinction is made with respect to new trials in ejectment and those allowed in other forms of action, and only the causes which may be urged generally will be entertained. It must be confessed that under the modern form of the action, where parties sue and defend in their own names, where the estates claimed can be definitely ascertained and the position and boundaries of the land fixed with certainty, the old reasons which rendered inconclusive one trial in ejectment can have no force and should not be permitted to have any weight. There is, in fact, no good reason why one judgment duly rendered should not be a bar to further prosecutions, nor do the courts attempt to give any. About all that can be said is, that when the action was remodeled a second trial was permitted as a sort of compromise with the old system which allowed a number, and that the conservative feeling which has ever pervaded both bench and bar has permitted this regulation to stand after the reasons which originally sustained it had failed. The policy of the law is to secure the quiet and repose of titles, and when a title has once been fairly adjudicated and the rights of the parties established the judgment should not only be conclusive but final.

§ 563. **At common law.**—The most ancient proceeding for redress at common law, in the case of a wrong verdict by a jury, was to sue out a writ of attaint. This was allowed on the theory that the jurors had made a false oath, thereby becoming stained with perjury which rendered them infamous. The punishment originally inflicted for this offense, upon conviction, was extremely severe, but the rigor of the law was greatly mitigated during the reign of Henry VIII.,⁵⁹ although it was not until comparatively recent years that the writ of attaint was finally abolished.⁶⁰ The object of the writ was not only to

⁵⁹ 23 Hen. VIII., c. 3.

⁶⁰ 6 Geo. IV., c. 50.

punish the jury for false verdict but also to reverse the judgment rendered thereon and restore the injured party to all that he had lost thereby. From this circumstance grew the practice of applying to the court *in banc* for a retrial of the issues, and where sufficient cause was shown the court would always set the verdict aside and grant a new trial. Thus, if it was shown that there had been misconduct of the jury, as that the verdict had been arrived at without grave and serious deliberation, or if it had been perversely returned, contrary to the evidence or in opposition to the law as declared by the judge, it would be set aside by the full court and a new venire would be awarded. But if the verdict was just the court would not disturb it, although the evidence might be conflicting, or even though the weight of the evidence might seem to preponderate against it. And so it finally came to be the settled practice that a defeated litigant was always at liberty to apply for a rehearing of the cause before another jury, and, upon proper showing, the case might be retried either upon the same, or additional, or even different evidence. This practice has never been abandoned, and courts still have, and continue to exercise, a general discretionary power to grant or refuse new trials according as the exigencies of the particular case may seem to indicate, in furtherance of substantial justice.

§ 564. Continued—When allowed or denied.—In actions of ejectment the same general grounds for a new trial may be urged as are available in other forms of action,⁶¹ and the motion is allowed or denied upon the same principles as apply in other cases. In many of the states the practice with respect to new trials is regulated by statute, yet such statutes, as a rule, are merely declaratory of the common law and in confirmation thereof. Where, as in most instances, the grounds upon which a motion for a new trial may be based are specifically enumerated, it is generally held that no others will be considered, but as this is a matter which rests largely in the discretion of the court a wide latitude is always permitted and the statute is liberally construed.⁶²

⁶¹ Goodhue v. Baker, 22 Ill. 262.

⁶² White v. Poorman, 24 Iowa, 108.

Under the old practice it would seem that the courts seldom granted a new trial in ejectment when the verdict was given for the defendant, because, all parties remaining in the situation they were previous to the commencement of the action, the claimant might bring a second ejectment without subjecting himself to any additional difficulties. But where the verdict was given against the defendant, in view of the change of possession thereby occasioned, and the difficulties resulting therefrom in the way of evidence if such defendant should himself bring an ejectment, the courts rather leaned to new trials on his behalf. But the reasons which influenced the courts in this particular having ceased with the abolition of the practice which produced them, it follows that the old precedents are now practically valueless and without even persuasive authority in the granting or denying of new trials.

§ 565. Upon what grounds granted.—As previously remarked, the action of ejectment is not distinguishable from other actions with respect to new trials for cause, and all of the reasons that may ordinarily be assigned for a rehearing can properly be presented. Thus, if improper testimony has been admitted, or if there has been a misdirection of the jury with respect to the law, this will generally be ground for a new trial. But, as in other actions, if the improper testimony has not prejudiced the case, or the objection was merely technical, or the evidence became immaterial, or the verdict was justified without it; or, if the misdirection was upon an immaterial point, or did not affect the verdict and justice appears to have been done, then a new trial will not be granted. These are the general principles by which courts are guided in the determination of all motions of this kind.⁶³

When the verdict is clearly against the evidence the court may, and should, set it aside and grant a new trial.⁶⁴ but, where a controversy consists chiefly of questions of fact, objections to a verdict must be very cogent to induce a court to adopt this course.⁶⁵ It is not enough, as a general proposition, that a verdict is against the weight of the evidence, provided

⁶³ See *Brown v. Mitchell*, 102 N. C. 347; *Lourance v. Goodwin*, 170 Ill. 390.

⁶⁴ *Belden v. Innis*, 84 Ill. 78.

⁶⁵ *Clark v. Day*, 93 Ill. 480.

there was evidence on both sides which was contradictory and it does not appear that such verdict has resulted from mistake or any wilful abuse of power.⁶⁶ Indeed, the right to set aside a verdict as against the evidence should be exercised only in extreme cases where it is clearly apparent that the jury acted under some mistake, or has plainly departed from some rule of law or made unwarranted deductions from the evidence.⁶⁷ But where the verdict is against the plain principles of law as laid down by the court, or against clear and unquestioned evidence, it becomes the duty of the court to grant a new trial notwithstanding the particular circumstances or general justice of the case.⁶⁸ Thus, if the plaintiff recovers more land than the deeds under which he claims show him to be entitled to, a new trial should be granted.⁶⁹

A new trial may be granted upon the ground that new and material evidence has been discovered, but to justify such a course it must appear that manifest injustice has been done the moving party or that the new evidence would materially change the complexion of the cause,⁷⁰ and that it could not, by ordinary diligence, have been produced at the first trial.⁷¹ Where the effect of such evidence is merely to impeach the character of a witness,⁷² or tends simply to contradict his testimony,⁷³ a new trial will rarely be granted. And, in any event, such evidence must be more than merely cumulative.⁷⁴ As the statute in most states provides for a new trial in ejectment on payment of costs and without special cause shown, new trials are less freely granted on common law grounds,⁷⁵ but, notwithstanding this statutory privilege, there is nothing

⁶⁶ Tolman v. Race, 36 Ill. 472; Simmons v. Waldron, 70 Ill. 281; Murray v. Wells, 57 Iowa, 26; Cottle v. Morris, 59 Cal. 317.

⁶⁷ Murray v. Wells, 57 Iowa, 26. ⁶⁸ Murchison v. Warren, 50 Tex. 33; Wait v. McNeil, 7 Mass. 261; Reynolds v. Lambert, 69 Ill. 495; Irving v. Cunningham, 58 Cal. 306.

⁶⁹ Stumpf v. Osterhage, 94 Ill. 115.

⁷⁰ Chicago, etc. R. R. Co. v.

Schumacher, 77 Ill. 583; Miller v. Ross, 43 N. J. L. 552.

⁷¹ Ward v. Voris, 117 Ind. 368.

⁷² State v. Carr, 21 N. H. 166;

Peyton v. Kruger, 77 Ind. 486.

⁷³ Brown v. Mitchell, 102 N. C. 347; Kendall v. Limberg, 69 Ill. 356.

⁷⁴ Burns v. People, 126 Ill. 282; Donnally v. Burkett, 75 Iowa, 613.

⁷⁵ Walker v. Armour, 22 Ill. 658.

to prevent the granting of new trials before final judgment, as in other cases.

§ 566. **When verdict will not be disturbed.**—It will frequently happen, in the trial of ejectment suits, that many witnesses will be called for the purpose of proving locations, non-existing monuments, acts of possession, and matters of like character, and that, as a result, there will be apparent contradictions and conflicting stories. But where the real controversy is one of fact these matters all lie within the province of the jury. They are to weigh the evidence, and reconcile it if possible, but if that cannot be done they still have a right to decide according to the weight of the evidence as it may appear to them.⁷⁶ When this has been done and a verdict returned, then, in the absence of errors of law, the verdict will not be disturbed, notwithstanding a conflict of evidence, if by any fair and reasonable intendment the facts will authorize a verdict.⁷⁷

§ 567. **Under the statute.**—The revised statutes of most of the states have preserved to the defeated party in ejectment, the right of one new trial without cause, provided, that the application for the vacation of the judgment and reinstatement of the suit be made within a limited time; usually one year. As a condition of the order of vacation all costs must have been paid and any other prescribed requirement must be complied with.⁷⁸ This trial is granted as a matter of right and without showing cause, and, where there has been a compliance with statutory requirements, it would seem the court has no discretion.⁷⁹

A further new trial is also provided for in some of the states and the court, upon application made within one year after the rendition of the second judgment, if satisfied that justice will thereby be promoted and the rights of the parties more satisfactorily ascertained and established, may vacate the second

⁷⁶ Tolman v. Race, 36 Ill. 472; Lourance v. Goodwin, 170 Ill. 390.

⁷⁷ Lourance v. Goodwin, 170 Ill. 390.

⁷⁸ See Pugh v. Reat, 107 Ill. 440; Cox v. Dill, 85 Ind. 336;

Davidson v. Lamprey, 16 Minn. 445.

⁷⁹ Emmons v. Bishop, 14 Ill. 152; Lowe v. Foulke, 103 Ill. 58; Ind. etc. Co. v. M'Broom, 108 Ind. 312.

judgment and grant a new trial. The granting of such second new trial, however, lies within the discretion of the court,⁸⁰ which may refuse same if merit is not shown,⁸¹ and such refusal cannot be assigned for error.⁸²

Not more than two new trials may be granted under the statute, but this does not preclude the court from granting new trials as in other cases, and where common-law grounds for a new trial are shown a compliance with statutory conditions is not necessary.⁸³ It would seem, however, that where a party has a statutory right to a new trial on payment of costs, a new trial on common-law grounds will be less readily granted.⁸⁴

While the privilege of applying for a statutory new trial is limited, as a rule, to one year after rendition of judgment, yet where an appeal has been taken therefrom the time during which the action may be pending on an appeal or writ of error is not reckoned as part of such year. Nor is it essential that the order vacating a judgment should be made within the year provided application has been made in apt time.⁸⁵

§ 568. *Time for application.*—As just stated an application for a new trial may be made at any time within one year after rendition of judgment in the ejectment suit. This, it will be perceived, is a distinct departure from the general rule with respect to motions for a new trial, which, in the ordinary case, must be made at the same term at which the judgment is entered. If made after the term has expired the court, as a general proposition, is without power to entertain the motion or to set the judgment aside.⁸⁶ But an action of ejectment is an exception to the general rule where the statute gives the unsuccessful party a new trial as of course, and where the time of application is limited, a motion made within the period of limitation is in time, notwithstanding that the term at which judgment was entered has long expired.⁸⁷

⁸⁰ *Riggs v. Savage*, 4 Gil. (Ill.) 129.

⁸¹ *Lafin v. Herrington*, 17 Ill. 399.

⁸² *Vance v. Schuyler*, 1 Gil. (Ill.) 160.

⁸³ *Goodhue v. Baker*, 22 Ill. 262.

⁸⁴ *Walker v. Armour*, 22 Ill. 658.

⁸⁵ *Stolz v. Drury*, 74 Ill. 107.

⁸⁶ *Cook v. Wood*, 24 Ill. 295.

⁸⁷ *Gage v. Chicago*, 141 Ill. 642.

§ 569. **Payment of costs.**—While a defendant is not required to pay damages assessed in order to secure a new trial,⁸⁸ it is yet an indispensable condition that he shall pay the costs,⁸⁹ and such payment, as well as his application, must be made within the time limited by statute.⁹⁰ So strictly is this construed that if an order for a new trial has been entered and the costs, in fact, have not been paid, the order will be regarded as conditional and will be vacated at the expiration of the time limited for such payment where the moving party has failed to comply with the rule.⁹¹

A variation from this rule may be found in some states where instead of paying the costs, the moving party is required to enter into an undertaking, with surety, that he will pay all costs and damages that may be recovered against him in the action, and when such a bond is presented and approved in apt time it becomes the duty of the court to vacate the judgment and grant a new trial.

It would further seem, that where a party promptly performs all that by law he is required to do, his right to a new trial becomes absolute and will not be defeated by mere delay on the part of the court. Thus, if the motion for a new trial is made within the time fixed by the statute, and the costs are paid as required by law, the moving party has done all that he is required to do to entitle him to a new trial, and the court has power to vacate the former judgment and award a new trial even though the period limited by the statute has expired.⁹²

As the right of new trial without cause is statutory, and, to a large extent, derogatory of the common law, the courts have generally construed the statute strictly and a failure to observe or fulfill any of the conditions precedent to the exercise of the privilege will be fatal to a second trial.⁹³

§ 570. **Who may make motion.**—The statute giving the right of new trial without cause confines such right to the

⁸⁸ *Meyers v. Phillips*, 68 Ill. 269.

⁸⁹ *Oetgen v. Ross*, 36 Ill. 335; *Davidson v. Lamprey*, 16 Minn. 445.

⁹⁰ *Pugh v. Reat*, 107 Ill. 440.

⁹¹ *Setzke v. Setzke*, 121 Ill. 30. But compare *Becker v. Sauter*, 89 Ill. 596.

⁹² *Stolz v. Drury*, 74 Ill. 107.

⁹³ *Davidson v. Lamprey*, 16 Minn. 445.

party against whom judgment was rendered, his heirs or assigns, and usually this privilege is strictly construed. It may be resorted to by the unsuccessful party, whether plaintiff or defendant,⁹⁴ but in all cases the motion can be made only by one who is concluded by the judgment.⁹⁵

§ 571. Judgment by default—Defendant under disability. The statute, in some states, has preserved the right of a new trial where the defendant, at the time of the entry of a judgment by default is under a disability. The disabilities mentioned are usually those which save rights from the effect of the statute of limitations, and the time during which such disability shall continue is not deemed any portion of the time allowed in which to make application for a new trial. Where this provision exists, a specific period, usually two years after the disability has ceased, is allowed in which application may be made. This was a part of the old New York statute on ejectment and has been very generally re-enacted in those states which adopted the New York practice during the first half of the last century.

The provision permitting the vacation of a judgment by default against a person under disability has been further extended, in most of the states, to the heirs, devisees and assigns of a person dying while under such disability, and the persons to whom the right is thus saved may exercise it at any time within the statutory limitation. This limitation is usually fixed at two years after the death of the disabled person.

On the other hand, it would seem that in some states a new trial as of right is not granted after a judgment by default, but only where there has been a trial on the merits.⁹⁶

§ 572. Effect of granting new trial.—The award of a statutory new trial in an ejectment suit wipes out the verdict so that no judgment can be rendered upon it,⁹⁷ or, if judgment has been entered, operates as a vacation of same without any

⁹⁴ *Chamberlain v. McCarthy*, 63 Ill. 262.

⁹⁵ *Hunter v. Chrisman*, 70 Ind. 439; *Gillman v. Circuit Judge*, 21 Mich. 372; *Williamson v. Wachenheim*, 62 Iowa, 196.

⁹⁶ See *Fisk v. Baker* 47 Ind. 534.

⁹⁷ *Edwards v. Edwards*, 22 Ill. 121.

formal order setting it aside.⁹⁸ In all respects the action stands as though there never had been a trial, except, that after such second trial another new trial may not be demanded under the statute.⁹⁹ But with this exception it would seem that the suit is to be regarded as an original proceeding, in no way affected by the evidence or bound by the rulings or judgments of the former trial.¹ As the granting of a new trial necessarily eliminates from the record all errors which may have intervened at the trial had, it follows that if a party would avail himself of such errors he must abide by the rulings, permit judgment to be entered against him and then take an appeal.²

§ 573. **Effect of judgment in trespass.**—The authorities are not agreed with respect to the effect of a judgment in trespass when the question of title is again raised, between the same parties, in a subsequent action of ejectment. If the general issue only is pleaded in the trespass suit, the contest narrows down to the mere fact of trespass, the plea virtually conceding the title of the plaintiff to the *locus in quo*.³ If a plea of title is interposed, as a plea of *liberum tenementum*, while it technically admits the plaintiff's possession, it involves an inquiry into the whole legal title,⁴ including the right of possession. Where this issue has been decided adversely to the defendant it is held by some of the cases to constitute an estoppel. In such event the defendant is bound by the judgment and cannot afterward relitigate the title when sued in ejectment for possession of the premises.⁵ Hence, it would seem that it is not uncommon, where this rule obtains, for a party claiming title to land and the right of possession, and who desires to avoid the delays consequent upon the statutory right to new trials in ejectment, to bring his action in trespass, and

⁹⁸ Maxwell v. Campbell 45 Ind. 360; Sheldon v. Van Vleck, 106 Ill. 45.

⁹⁹ Sheldon v. Van Vleck, 106 Ill. 45.

¹ Donahue v. Klassner, 22 Mich. 252; Hewitt v. Wisconsin Land Co., 81 Wis. 546; Hammond v. Carter, 161 Ill. 621; Elchart v. Schaffer, 161 Pa. St. 519.

² Bitting v. Ten Eyck, 85 Ind. 361.

³ Jacobson v. Miller, 41 Mich. 90.

⁴ Fort Dearborn Lodge v. Klein, 115 Ill. 177.

⁵ See Herschbach v. Cohen, 207 Ill. 517, 69 N. E. Rep. 932, 99 Am. St. 233.

so establish his right upon a single trial. When judgment is perfected, if the defendant does not yield the possession he may bring an action of ejectment, on the trial of which the record in the action of trespass will be conclusive evidence of his right and preclude the defendant from denying same as well as prevent him from attempting to obtain a new trial.⁶

In consonance with this doctrine it has also been held, that a judgment in favor of the defendant in an action of trespass, where a plea of *liberum tenementum* was interposed, is conclusive against plaintiff's title in a subsequent action of ejectment, if, in the trespass suit, the question of title was actually tried and determined. In such event *res judicata* may be pleaded in any subsequent proceeding between the same parties involving the same title, and the judgment will be taken as conclusive of their respective rights.⁷

On the other hand, numerous well considered cases announce the doctrine that a judgment in trespass cannot, under any circumstances, be a bar to a subsequent ejectment suit for the same premises, nor preclude a defense on the merits to a suit so brought, even though the parties to both suits are the same.⁸ It is contended that no other view is consistent with a statutory policy which permits a new trial in ejectment as a matter of right. Thus, it is said, if a judgment in trespass was permitted to be a bar to a subsequent action of ejectment between the same parties, and involving the title to the same land, the statutory right of new trial in ejectment could easily be nullified. The plaintiff, being at liberty to choose his form of action, would bring trespass and settle his title in one trial, and the statute relating to new trials would be rendered abortive and ineffectual.⁹

Where, as in some states, the scope of the action has been so broadened as to include all actions for the determination and quieting of title, it has been held that, whatever may be the

⁶ See *Shumway v. Shumway*, 12 Ind. 629; *Parker v. Hotchkiss*, 25 Conn. 321; *Chandler v. Walker*, 21 N. H. 286; *Sabins v. McGhee*, 36 Pa. St. 453.

⁷ *Herschbach v. Cohen*, 207 Ill. 517.

⁸ *Keyser v. Sutherland*, 59 Mich. 455; *Morse v. Marshall*, 97 Mass. 519; *Hargus v. Goodman*,

⁹ *Keyser v. Sutherland*, 59 Mich. 455.

form of the action, when the title is directly put in issue by the pleadings, a new trial may be had as a matter of right.¹⁰

§ 574. *Relief in equity.*—While disputed titles must be litigated at law and not in equity, yet equity may, and often does, interfere for the purpose of granting substantial justice. Particularly is this true in the matter of new trials. Courts of equity are invested with jurisdiction to decree new trials at law, when judgment has been entered by fraud, accident or mistake, and this jurisdiction is freely exercised in all proper cases.¹¹ But this relief will be granted only where the party applying for equitable aid is free from all negligence on his own part and has used the highest degree of diligence to prevent the fraud, accident or mistake.¹²

This, however, is the full extent of the court's powers. It may not retain the suit for the purpose of trying the issues, for it is contrary to all rules to try an ejectment suit in a court of equity, and in all cases in which the legal title is in dispute the remedy is ample and complete at law.¹³ When there is a complete remedy at law a court of equity will never assume jurisdiction, but will leave the parties to settle their rights in a legal forum.¹⁴

¹⁰ *Krettlme v. Franz*, 106 Ind. 360. Thus, where, in an action of partition, the defendant files a cross-complaint to quiet title in himself, and judgment goes against him, he will be entitled to a new trial as of right. *Hammann v. Mink*, 99 Ind. 282.

¹¹ As where a judgment was entered in contravention of an express agreement and the

knowledge of such entry concealed from the defendant until after the time for a new trial had expired. *How v. Mortell*, 28 Ill. 478. And see *Chicago, etc. R. R. Co. v. Hay*, 119 Ill. 493.

¹² *Tallman v. Becker*, 85 Ill. 183.

¹³ *Wells v. Lamme*, 88 Ill. 174.

¹⁴ *Wells v. Lamme*, 88 Ill. 174.

CHAPTER XVII.

FORCIBLE ENTRY AND DETAINER.

§ 575. General principles.	§ 581. Demand for possession.
576. Right of owner to make entry on land.	582. The complaint.
577. When the action lies.	583. Dismissal of complaint.
578. Jurisdiction.	584. The issues.
579. Parties to the action.	585. The proofs.
580. Cotenant versus cotenant.	586. The judgment.
	587. Execution.
	588. Damages.

§ 575. **General principles.**—Partaking in some respects of the same general nature as the action of ejectment, is the statutory remedy for the recovery of the possession of lands known as the action of forcible entry and detainer, a summary proceeding which has almost superseded the more cumbersome methods of ejectment in cases where the questions in dispute go only to the right of occupancy.

The general purpose of the action is, that, without respect to the actual condition of the title, where any person is in the actual and peaceable possession of land he shall not be turned out by a strong hand or with force, violence and terror. It is immaterial that the party so using force may have the superior title or the better right to possession, for the policy of the law is to preserve the public peace and to this end requires the party out of possession to respect and resort to the law alone to obtain a restitution of his rights. Not only will the law refuse to sanction a possession acquired by force, but will, when appealed to in proper form, compel a surrender to the party thus dispossessed without inquiry as to which party owns the land or has the legal right to its possession.¹⁵

¹⁵ *Iron Mountain R. R. v. Johnson*, 119 U. S. 608; *Reeder v. Purdy*, 41 Ill. 279; *Dilworth v. Fee*, 52 Mo. 130; *Dustin v. Cowdry*, 23 Vt. 631; *Hoffman v. Harrington*, 22 Mich. 52; *Coonradt v. Campbell*, 25 Kan. 227.

The original object and scope of the action grew out of and was founded upon these principles, and they are still the underlying ideas of the remedy wherever administered. But of late years the application of these principles has been greatly extended and they have been made to cover conditions not contemplated by the early form of the action. The statute, as generally enacted, usually provides for three classes of cases in which the remedy may be employed: (1) where an entry has been made, other than is permitted by law, accompanied by force and violence; (2) where a wrongful or illegal entry has been made as contradistinguished from a forcible or violent one, and (3) where there is a wrongful holding over or detention. The statute also very generally provides for a summary restoration of a party entitled to possession, when an entry has been made upon vacant and unoccupied lands by one without right or title thereto. These latter provisions have greatly extended the scope of the action where they have been adopted, as they have also greatly tended to obscure and complicate it. It is still true that controverted questions of title cannot be tried or determined in this form of action,¹⁶ yet from a review of the legislation and decisions of some of the states it would certainly seem that controverted questions respecting the right to possession may be heard and decided. This is a distinct innovation on the rules of the old remedy and the right in other states has been denied.¹⁷

As the action depends almost wholly upon the statute, is summary in its nature and in derogation of the common law, the courts are generally strenuous in their insistence that all of the statutory conditions and requirements necessary to jurisdiction must clearly exist, while the mode of procedure must in all cases be strictly followed.¹⁸ Unfortunately these methods are very diverse and for this reason it is well nigh impossible to frame general rules that shall be of universal application.

¹⁶ *Coonrad v. Campbell*, 25 Can. 227; *Boardman v. Thompson*, 3 Mont. 387; *McCarty v. McMullen*, 38 Ill. 237; *Voll v. Hollis*, 60 Cal. 569; *Taylor v. Scott*, 10 Oreg. 483; *Vess v. State*, 93 Ind.

211; *Newton v. Leary*, 64 Wis. 190.

¹⁷ *Sanchez v. Lonreyro*, 46 Cal. 641.

¹⁸ *Fitzgerald v. Quinn*, 165 Ill. 354.

In the main the remedy is calculated for the relief of landlords, and is intended to furnish a quick and easy way of obtaining possession from obstinate and often irresponsible tenants who are holding over after the expiration of the leases under which they entered. This, however, is a later development. Originally the gist of the action was the forcible entry; the detainer was a mere consequence and was not an independent ground for relief. This doctrine has been announced in recent years.¹⁹

§ 576. **Right of owner to make entry on land.**—It is a cardinal rule that the right of ownership of land draws to it, as a necessary corollary, the right to the possession thereof. As a legal sequence the owner may at all times, unless by some act of his own he has waived his right so to do, peaceably enter upon his land and exercise acts of control over it, and while he thus has possession the law favors and helps him in the assertion of his right. But if another, by any peaceable means, has taken a prior possession or, in a peaceable manner, holds and detains the property to the exclusion of the rightful owner, he may not enter with force and a strong hand but must resort for legal redress to the remedies provided for such an emergency.²⁰

This was not the doctrine of the common law, however, for by that law the owner of land was permitted to enter against the will of the occupant, and, using all necessary force, expel him therefrom, without being guilty of a trespass. But this doctrine, however suited to the turbulence and violence of early times, is not in keeping with the genius of our institutions or the proper administration of justice in a well ordered and law-abiding community, and so, as society advanced in the scale of civilization and men began to claim the rights guaranteed to them by the spirit of the English constitution, its application became intolerable, and was among the first of the old laws to be abrogated by Parliament. This was effected by

¹⁹ See *Peacock v. Leonard*, 8 Nev. 84; *Greeley v. Spratt*, 19 Fla. 644.

²⁰ *Mosseller v. Deaver*, 106 N. C. 494, 8 L. R. A. 537; *Giddings*

v. Water Co., 83 Cal. 96; *Dilworth v. Fee*, 52 Mo. 130; *Huttalin v. Misner*, 70 Ill. 205; *Judy v. Citizen*, 101 Ind. 18.

the statute of 5 Richard II., which has been substantially re-enacted in all of the states.

The general intendment of the statute of forcible entry and detainer has been shown in the preceding paragraph. The vital principle is, that the owner of land, notwithstanding he may have a superior right, shall not by violence oust a present occupant, but, with due regard to the proprieties of modern life and the preservation of the public peace, shall proceed in a regular and constitutional manner to assert his rights. If, in violation of this rule, he proceeds in a summary manner to oust the occupant, the possession thus gained will be held unlawful,²¹ and the ejector may be held to make restitution to the party so dispossessed as well as to answer to him in damages.²²

As the object of the law is not only to preserve the public peace but also to compel parties to resort to the civil courts for the determination of their rights, the degree of force or violence employed in a summary dispossession is immaterial so far as respects this action. At common law it was provided that the ouster might be accompanied by as much force as was "necessary", provided no wanton violence was used; hence the owner was not at liberty to beat the intruder but only to overcome resistance by force or, as the old books quaintly express it, to "gently lay hands on him." The impress of this theory is still seen in some of the American decisions, particularly those of an early date, which held that actual force is necessary to constitute the injury,²³ but the later cases very generally affirm the better doctrine that physical violence is not

²¹ *Emerson v. Sturgeon*, 59 Mo. 404.

²² *Reeder v. Purdy*, 41 Ill. 279; *Dilworth v. Fee*, 52 Mo. 130; *Dustin v. Cowdry*, 23 Vt. 631; *Hoffman v. Harrington*, 22 Mich. 52; *Larkin v. Avery*, 23 Conn. 304; *Sinclair v. Stanley*, 69 Tex. 718; *Mosseller v. Deaver*, 106 N. C. 494, 8 L. R. R. 537; *Judy v. Citizen*, 101 Ind. 18.

²³ See *Hoffman v. Harrington*, 22 Mich. 52; *Fort Dearborn Lodge v. Klein*, 115 Ill. 177.

There is considerable uncertainty on this point arising through the confusion of criminal and civil remedies. In many states a forcible entry is an indictable offense, and to constitute the crime there must be a violent taking of possession with menaces, force, and arms. The entry must be accomplished by acts of actual violence and terror directed against the person in possession. See *Lewis v. State*, 99 Ga. 692.

required to make the entry forcible. It is sufficient if the entry, either in the presence or absence of the possessor, is attended with such a display of force as manifests an intention to intimidate the party in possession, or to deter him from defending his rights, or to excite him to repel the invasion.²⁴

§ 577. **When the action lies.**—The action of forcible entry at the present time is purely statutory and the rights of parties affected thereby must be sought for in the statute and be measured by its terms. As a general rule a person entitled to the possession of lands or tenements may be restored thereto whenever he has been dispossessed by a forcible entry, or, when a peaceable entry has been made, the possession is unlawfully withheld. Upon this general basis the statute makes a number of specializations, varying with the policy of the particular state. It is invariably extended to include lessees for years, and persons holding under them, who continue to hold possession, without right, after the determination of the tenancy, whether such termination occurs by limitation or through a breach of any of the conditions upon which the estate was held. It is also generally made to apply to cases where a vendee, having obtained possession under an agreement of purchase, fails to comply with such agreement and withholds such possession after demand or notice by the person entitled to same. So, too, where lands have been conveyed and the grantor remains in possession, or where the lands have been sold under a judgment or decree, and the judgment debtor or defendant refuses or neglects to surrender possession, after the expiration of the period allowed for redemption, such parties may be ousted by a judgment of restitution in this form of action.

The action lies only for the recovery of possession and hence no damages should be asked for or allowed in the judgment.²⁵

The character and extent of the plaintiff's prior possession, sufficient to enable him to sustain an action, does not seem to be altogether well settled. The ancient formula was that he should be in "actual" possession, and this is also the language of the statute in many cases. But slight circumstances have

²⁴ *Ely v. Yore*, 71 Cal. 130; *Ladd v. Dubroca*, 45 Ala. 421.

²⁵ *Poe v. Bradley*, 44 Ark. 500.

The statute in some states permits damages, but this is not the general rule.

often been permitted to indicate actual possession, and almost any series of overt acts which tend to show dominion and a purpose to occupy and exclusively control will be sufficient.²⁶ But mere occasional acts of possession,²⁷ or acts which amount to no more than a trespass,²⁸ will not confer the right to maintain an action for restitution.

§ 578. **Jurisdiction.**—Actions of forcible entry and detainer have always been cognizable by justices of the peace, both in England and America. This grows out of the fact that originally the action was of a criminal nature—a trespass—and the injury complained of was an infraction of the peace. When the purely civil action was created the right to hear and determine the issue was allowed to remain as theretofore. As no damages are assessed it follows that the jurisdiction of the justice is not limited as in civil actions *ex contractu* and the value of the lands is an immaterial circumstance.²⁹

The action may also be prosecuted in a court of record the same as other cases at law. In either event the issue may be tried by a jury.

§ 579. **Parties to the action.**—As a general proposition any person in the actual and peaceable possession of lands upon which a forcible entry is made may maintain an action for summary restitution.³⁰ So, too, any one entitled to possession may, in many cases, institute this form of action against a party wrongfully withholding the same from him.³¹ It would further seem that the right of action is personal to the injured party and will not pass to an assignee.³²

²⁶ *Greeley v. Spratt*, 19 Fla. 644; *Coonradt v. Campbell*, 25 Kan. 227; *Pensoneau v. Bertke*, 82 Ill. 161.

²⁷ *Hays v. Altizer*, 24 W. Va. 505; *Clements v. Hays*, 76 Ala. 280; *Johnson v. West*, 41 Ark. 535.

²⁸ *Anderson v. Mills*, 40 Ark. 192; *Williams v. McGaffigan*, 132 Mass. 122; *Wray v. Taylor*, 56 Ala. 188.

²⁹ *Silvey v. Summer*, 61 Mo. 253.

³⁰ *Fore v. Campbell*, 82 Va. 808; *Sinclair v. Stanley*, 69 Tex. 718; *Brown v. Feagins*, 37 Neb. 256; *Oklahoma v. Hill*, 4 Okla. 541; *Jones v. Shay*, 50 Cal. 508.

³¹ *Lewis v. Brandle*, 107 Mich. 7; *Young v. Barr*, 69 Miss. 879; *Muller v. Blake*, 167 Ill. 150; *Brown v. Burdick*, 25 Ohio St. 260.

³² *Dudley v. Lee*, 39 Ill. 339; *Fitzgerald v. Quinn*, 165 Ill. 354.

Where the original entry was tortious or unlawful the action will lie only against the person who made the entry, or such other persons as are collusively in under him and who are privy to the tort. Hence, a person who purchases for value and takes possession in good faith cannot be turned out by this summary remedy merely because the party from whom he purchased may have unlawfully entered years before. In such a case the parties must resort to ejectment.³³ Nor can a defendant be evicted on a sham possession. The possession, for an invasion of which complaint is made, must be actual, or at least of such a character as to show a holding in good faith.³⁴ In any event there must be a showing of an intention to possess, accompanied with acts indicative of that purpose, and if these are wanting the action will not lie.³⁵ Neither can the action be maintained on a scrambling possession. Where two parties are struggling for possession neither may maintain the action against the other until he has acquired an actual possession which has ripened into a peaceable occupation of the land.³⁶ It has further been held, that one who enters under a *bona fide* claim to rightful possession and in a peaceable manner, is not liable to proceedings for forcible entry and detainer.³⁷ This is fully in consonance with the old ideas involved in the action but the statute, in some instances, has greatly disturbed the old rules.

A corporation, like an individual, is within the operation of the forcible entry and detainer act, and a possession acquired by violence must be restored without reference to the better right.³⁸

§ 580. **Cotenant versus cotenant.**—At common law cotenants were practically without a remedy against each other, the possession of one, in contemplation of law, being the possession of all, and, it seems, this principle precluded the maintenance of an action for forcible entry and detainer. But pro-

³³ *Fitzgerald v. Quinn*, 165 Ill. 354; *Alderman v. Boeken*, 25 Kan. 658.

³⁴ *De Graw v. Prior*, 60 Mo. 56.

³⁵ *Edwards v. Cary*, 60 Mo. 572.

³⁶ *Voll v. Butler*, 49 Cal. 75.

³⁷ *Townsend v. Chapman*, 45 Cal. 673. And see *Conroy v. Duane*, 45 Cal. 597; *Russell v. Chambers*, 43 Ga. 478.

³⁸ *Iron Mountain R. R. Co. v. Johnson*, 119 U. S. 608.

ceedings under the English law relating to this remedy partook largely of a criminal nature, subjecting the offender to fine and imprisonment, as well as restoring the injured party to his possession, and under the criminal phases of the law an indictment would lie against a joint tenant or tenant in common who forcibly ejected his cotenant or forcibly held out against him, for, notwithstanding the entry of the offending tenant was lawful yet this did not excuse violence done to the other.³⁹ This, however, seems to have been the extent of the remedy and if the ejected tenant desired to try the right of possession it seems he was forced to proceed by ejectment.

In the early cases in this country the common-law doctrine of unity of possession was frequently appealed to by cotenants in possession who held out against the others but the courts very generally held, that a tenant in common who had been ejected by his cotenant was as much injured as though he held in severalty; that the denial of a summary remedy for such injury, upon a presumption of law which the facts of the case contradicted, was a defect of the common law which the acts concerning forcible entry and detainer were intended to supply, and that there were no good reasons why a joint tenant should not be entitled to their benefits. The courts, in arriving at this conclusion, seem to have proceeded upon the following theory: That our law is intended to furnish a civil remedy in all cases where a party has been forcibly deprived of possession; that the scope and design of our acts are the same as that of England, and hence where a party may be indicted there a civil action may be maintained here, and that, if a cotenant may maintain ejectment, if he can prove an actual ouster, which rebuts the presumption that the possession of one is the possession of the other, there is no reason why he should not be permitted to avail himself of the summary remedy furnished by the statute.⁴⁰

The rulings of the early cases seem to have been generally followed and the settled law would now seem to be, where the statute is silent upon the subject, that one joint tenant or ten-

³⁹ Russell on Crimes, 286.

Dana (Ky.), 111; Presbery v.

⁴⁰ See Mason v. Finch, 1 Scam. (Ill.) 495; Eads v. Rucker, 2

Presbery, 13 Allen (Mass.), 281.

ant in common, may maintain an action of forcible entry and detainer against his cotenant and may have restitution of his undivided interest.⁴¹ In such event he will simply be restored to the common possession,⁴² which he will share with his cotenant, as neither can recover the exclusive possession of the premises against the other.⁴³

§ 581. **Demand for possession.**—The general subject of notice to quit and demand for possession has already been quite fully considered in former parts of the work,⁴⁴ and a passing allusion is all that will be attempted in this place. Originally it would not seem that any demand was necessary by one who had been forcibly evicted from his land, and in some cases this is still the rule, but usually the statutes relating to forcible entry and detainer have made provision for a written demand by the party out of possession as a prerequisite to the maintenance of the action. As a rule no definite time is prescribed for the service of the notice before the commencement of the suit, and when such is the case it has been held that the demand need not even be made a reasonable time before action, provided it actually was made before the complaint was filed.⁴⁵ On the other hand, if the statute fixes the time or duration of notice a strict compliance therewith will be necessary in order to maintain the action.⁴⁶

The essentials of a demand for possession, when same is required, are generally fixed by statute. When such is the case these requirements become matters of substance. But where the statute simply prescribes a demand in writing, then a notice which calls upon the withholding party to "quit and deliver up possession" to the demandant will be a full compliance with the statutory requirement.⁴⁷ In every case, however, the notice should show who it is that claims to be entitled to possession and who makes the demand, and no one but the person

⁴¹ *Bowers v. Cherokee Bob*, 45 Cal. 495.

⁴² *Jamison v. Graham*, 57 Ill. 94.

⁴³ *Jamison v. Graham*, 57 Ill. 94; *Henderson v. Allen*, 23 Cal. 519.

⁴⁴ See § 150, *ante*.

⁴⁵ *Huftalin v. Misner*, 70 Ill. 205. In this case the demand for possession was made and suit brought the same day.

⁴⁶ *Nason v. Best*, 17 Kan. 408.

⁴⁷ *Vennum v. Vennum*, 56 Ill. 430.

who thus claims the premises and who makes demand can maintain the action under such notice.⁴⁸

The demand itself should be made by the claimant or party entitled to possession,⁴⁹ but this, it seems, may be accomplished through an agent when the fact of agency is disclosed.⁵⁰ The service of the notice must be proved by a witness,⁵¹ and it seems that neither an endorsement upon the paper nor a separate statement of service, either by an officer or private person, whether sworn to or not, will be sufficient to prove a demand or fulfil the intendment of the statute.⁵²

§ 582. The complaint.—The action is instituted by the filing of a statement of the demandant's grievance, called a complaint. As before remarked the proceeding by forcible entry and detainer being in derogation of the common law, and the right to pursue same being dependent wholly on the statute, all of the statutory requirements must be substantially observed. This applies with particular force to the complaint, which, being the foundation of the action, must contain all of the essential elements which confer jurisdiction or the whole proceeding will be void.

It would seem that formerly much difficulty was experienced in framing the complaint but, in most of the states, this has to a great extent been overcome by a statutory prescription of the substance of same in the simplest terms and form. At present the principal allegations are those which relate to the plaintiff's right of possession; the withholding thereof by the defendant, and the description of the property or *locus in quo*. It has been held that this latter should be as precise and specific as is required in an action of ejectment,⁵³ but the general and better rule would seem to be that any description by which the prop-

⁴⁸ Nason v. Best, 17 Kan. 408.

⁴⁹ Ball v. Chadwick, 46 Ill. 28.

⁵⁰ Nixon v. Noble, 70 Ill. 32.

⁵¹ Doran v. Gillespie, 54 Ill. 366.

⁵² Vennum v. Vennum, 56 Ill. 430.

⁵³ Premises were described as "fifty acres of what is known as

Elliott's Bluff, a survey of land situate on the south side of Crooked river, in Camden county, Georgia." Held, fatally indefinite. Orme v. King, 60 Ga. 523. Land described as "Three and one-half acres off of" a designated tract is not a good description. Klingensmith v. Faulkner, 84 Ind. 331.

erty can be readily identified and located will be sufficient.⁵⁴ It is essential, however, that the description be wholly free from ambiguity or uncertainty, for otherwise it will confer no jurisdiction,⁵⁵ and defects of this character cannot be supplied by parol evidence given on the trial.⁵⁶ As the venue is local the complaint should state the county in which the land is situated, a failure in this respect will render the pleading defective for want of certainty.⁵⁷

§ 583. **Dismissal of complaint.**—Where the complaint in an action of forcible entry is defective in substance, advantage thereof may be taken by a motion to quash the complaint. Such motion, however, must be made in the first instance, and it seems an objection to the sufficiency of the complaint comes too late if made on the trial,⁵⁸ or for the first time on appeal.⁵⁹

§ 584. **The issues.**—In the original form of the action the only question presented is the fact of dispossession, and where the injury complained of consists of a forcible or violent ouster this will be the only issue to be tried.⁶⁰ But in practice this form of the action is infrequent, the usual complaint being for a withholding of possession. When this is the case the material question to be determined is the right to possession.⁶¹ The only plea necessary is "not guilty", and under this plea the defendant may give in evidence any matter of defense that

⁵⁴ *Cairo, etc. R. R. Co. v. Ferry Co.*, 82 Ill. 230. Where land was described as "the premises inclosed by us, situate in the county of Cook, and state of Illinois, being the same on which you now reside, containing about one hundred acres, more or less, and commonly called North Grove," this was held sufficiently certain for the purpose of the action. *Atkinson v. Lester*, 1 Scam. (Ill.) 407. And see *Houghton v. Potter*, 23 N. J. L. 339; *Silvey v. Summer*, 61 Mo. 253.

⁵⁵ *Applegate v. Applegate*, 16 N. J. L. 321. In this case the

premises were described as "the messuage or dwelling house."

⁵⁶ *Schaumteffel v. Beem*, 77 Ill. 567. As where land is described as "part of the northeast quarter, etc., with the house situated thereon."

⁵⁷ *Supervisors v. Ellison*, 8 W. Va. 308.

⁵⁸ *Brown v. Keller*, 32 Ill. 151.

⁵⁹ *Leary v. Patterson*, 66 Ill. 203.

⁶⁰ *Allen v. Tobias*, 77 Ill. 169; *Jones v. Shay*, 50 Cal. 508.

⁶¹ *Myers v. Koenig*, 5 Neb. 419; *Smith v. Hollenback*, 51 Ill. 223; *Milner v. Wilson*, 45 Ala. 478; *Van Eman v. Walker*, 47 Mo. 169.

may properly tend to negative or defeat the plaintiff's claim. Where it appears from the evidence that the question involved is one of title, and not merely of possession, the case should be dismissed.⁶²

§ 585. **The proofs.**—The character of the evidence will vary somewhat with the different phases of the action. Thus, if the complaint is for a forcible entry and detainer it will be necessary to show that the plaintiff was in the actual possession of the premises upon which the forcible entry is alleged to have been made; that the defendant unlawfully invaded such possession and expelled the plaintiff therefrom, and that he still detains it.⁶³ It has been held that the possession thus shown must be an actual occupancy as distinguished from a mere constructive possession, such as the legal title to land draws to it,⁶⁴ but where the statute gives a right of action for entry upon vacant or unoccupied land the rule may not apply. It has also been held, that one who is in actual possession of part of a tract of land, holding the entire tract under color of title, will be regarded in law as in possession of the whole; and that actual occupancy thereof will not be necessary to entitle him to maintain the action.⁶⁵ This, however, brings up one of the contradictory phases of the action. A person may have title to land of which he is not in the actual possession, but as the action of forcible entry does not proceed on title this fact may not avail him in many cases, and to enforce his right of possession he must resort to ejectment.⁶⁶

The allegation of the time of the forcible entry is material, and the date thereof must be proved as alleged.⁶⁷ The facts constituting the alleged forcible entry or forcible detainer must also appear, and if no evidence is offered tending to show that the defendant detained the premises by force, or by menaces

⁶² *Pettit v. Black*, 13 Neb. 142; *Taylor v. Scott*, 10 Oreg. 483; *Hughes v. Mount*, 23 W. Va. 130; *Grohousky v. Long*, 20 Neb. 362.

⁶³ *Conroy v. Duane*, 45 Cal. 597; *McCartney v. Aner*, 50 Mo. 395.

⁶⁴ *Thompson v. Sorenberger*, 59 Ill. 326; *Womack v. Powers*, 50

Ala. 5; *Barlow v. Burns*, 40 Cal. 351.

⁶⁵ *Prewitt v. Burnett*, 46 Mo. 372; *Moore v. Douglass*, 14 W. Va. 708.

⁶⁶ *Thompson v. Sorenberger*, 59 Ill. 326.

⁶⁷ *Hoffman v. Harrington*, 25 Mich. 146.

and threats of personal violence, the suit fails. The action cannot be made a substitute for the action of ejectment.⁶⁸

Where the action is brought for an unlawful detainer or withholding of possession, it will be sufficient to show that the relation of landlord and tenant had existed; that the time for which the premises were let has expired, and that the defendant persists in holding the lands after proper demand made for the possession thereof.⁶⁹

In case the tortious entry is made upon vacant and unoccupied lands, thus invading a constructive possession only, the course to be pursued is not so clear. A person in the actual and peaceable possession of land will usually be deemed to be rightfully in possession, and the burden of disproving same is cast upon the person who disputes this apparent possessory right.⁷⁰ Hence, a party suing in a case of this kind is required to show a right of possession in himself,⁷¹ and cannot rely upon the lack of right in those whom he seeks to dispossess.⁷² This phase of the action is not recognized in many states and is of doubtful utility where allowed.

As the title is not in any sense involved, the sole question being the fact of dispossession,⁷³ it follows that no evidence respecting ownership should be received,⁷⁴ yet, where there is no apparent actual possession of a portion of the premises, the plaintiff may, for the purpose of showing the extent of his possession, introduce the deeds or other muniments of title under which he claims.⁷⁵ This principle, however, is never extended so as to permit a defendant to introduce title papers which would tend to show an adverse possession,⁷⁶ although it has been held that the defendant may introduce evidence of title in himself, not for the purpose of establishing or trying title,

⁶⁸ Taylor v. Scott, 10 Oreg. 483.

⁶⁹ Cairo, etc. Co. v. Wiggins Ferry Co., 82 Ill. 230.

⁷⁰ McLean v. Farden, 61 Ill. 106.

⁷¹ Fitzgerald v. Quinn, 165 Ill. 354.

⁷² McIlwain v. Karstens, 152 Ill. 135.

⁷³ McCarty v. McMullen, 38 Ill. 237.

⁷⁴ Sanchez v. Lonreyro, 46 Cal. 641.

⁷⁵ Pearson v. Herr, 53 Ill. 144; Allison v. Casey, 4 Baxt. (Tenn.) 587; Murphy v. Snyder, 67 Cal. 451.

⁷⁶ Slate v. Eisenmeyer, 94 Ill. 96.

but to show that his entry was made in good faith and not with wrongful intent.⁷⁷

§ 586. **The judgment.**—If the defendant is found guilty the judgment usually is that the plaintiff have restitution of the premises, together with his costs, and that a writ of restitution be awarded.⁷⁸ It does not seem that any particular form is required in the rendition of the judgment and any order absolute that the plaintiff be restored to the possession of the land detained, or upon which entry has been made, and that a writ issue to execute such judgment, will probably be sufficient. In a few states damages may be recovered in addition,⁷⁹ but this hybrid form of action finds but little recognition and the general rule is that the judgment should be only for possession and costs and not for damages.⁸⁰

As the immediate right of possession is all that is involved in this action it follows that a judgment therein is not a bar to ejectment.⁸¹

§ 587. **Execution.**—The judgment in forcible entry, if rendered for the plaintiff, is enforced by a writ of restitution. The manner of executing the writ is much the same as in case of a writ of possession in ejectment. The officer executing the writ may enter the premises, forcibly if necessary, and having entered he should remove the defendant, his servants and his chattels, doing as little damage as possible to effect the purpose.⁸² It has been held that the officer is not bound to remove the defendant's goods, but may do so as the agent of the plaintiff.⁸³ He must, however, evict all persons in possession, the test being that the plaintiff must be so established in his

⁷⁷ *Dennis v. Wood*, 48 Cal. 361.
But see *Walls v. Endel*, 7 Fla.
478.

⁷⁸ *Thompson v. Sorenberger*, 59
Ill. 326.

⁷⁹ *Hitchcock v. Pratt*, 51 Mich.
263.

⁸⁰ *Walker v. McGill*, 40 Ark.
38.

⁸¹ *Riverside Co. v. Townsend*,
120 Ill. 9.

⁸² *Miller v. White*, 80 Ill. 580;
Union Township v. Bayliss, 40
N. J. L. 60; *De Graw v. Prior*, 68
Mo. 158.

⁸³ *Union Township v. Bayliss*,
40 N. J. L. 60.

⁸⁴ *Union Township v. Bayliss*,
40 N. J. L. 60.

possession that any person entering upon him, otherwise than by his invitation, would be subject to indictment for a forcible entry.⁸⁴

But an officer serving a writ of restitution has no right to remove a party who does not hold under the defendant in the writ,⁸⁵ or who is not in privity with him.

§ 588. **Damages.**—The remedy of forcible entry and detainer is designed only as a protection of the actual possession, whether right or wrong, and the judgment therein usually is that the dispossessed occupant have restitution of such possession. The entry, if forcible, undoubtedly constitutes a trespass, but the statute, as a rule, makes no provision for the trespass and if any damages are recovered they are only nominal and for the purpose of saving costs.

But where an occupant is forcibly evicted without due process of law he may always have his action for the trespass against the wrongdoer, and while there has been much diversity of opinion as to whether an action of trespass *quare clausum fregit* can be maintained against the owner of land, and whether he may not justify under the plea of *liberum tenementum*, the constant trend of the decisions has been that he is not to be distinguished from a stranger. It is contended, in support of this position, that the statute, not in terms, but by necessary implication, forbids a forcible entry upon the actual possession of another even by the owner. That such an entry is therefore unlawful; that being unlawful, it is a trespass, for which an action must necessarily lie.⁸⁶

The evicted party may, in all cases, recover nominal damages for the trespass, while some of the decisions hold that he is entitled to recover for any injuries inflicted upon his person or property, and that there may be exemplary damages if the unlawful act was done in a wanton and reckless manner.⁸⁷ The

⁸⁵ *Wallace v. Hall*, 22 Kan. 271.

⁸⁶ *Reeder v. Purdy*, 41 Ill. 279;
Chisholm v. Weise, 5 Okla. 217.

⁸⁷ *Mosseller v. Deaver*, 106 N.

C. 494, 8 L. R. A. 537; *Reeder v.*

Purdy, 41 Ill. 279. And see *Baumier v. Antiau*, 65 Mich. 31.

statute is not the same in all of the states and while the primary purpose in all cases is to recover possession, yet, in some states, the statute permits a substantial recovery for the wrongful entry and withholding as well.⁸⁸ In any event, however, a mere money judgment is erroneous. The judgment should be for possession and also for damages,⁸⁹ and the damages allowed cannot exceed the sum specifically claimed by the plaintiff.⁹⁰

⁸⁸ *Chisholm v. Weise*, 5 Okla. 217; *Farwell v. Easton*, 63 Mo. 446.

⁸⁹ *Farwell v. Easton*, 63 Mo. 446.

⁹⁰ *Moore v. Dixon*, 50 Mo. 424.

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